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# IMMIGRATION APPEAL CASES; selected judgements AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

1970

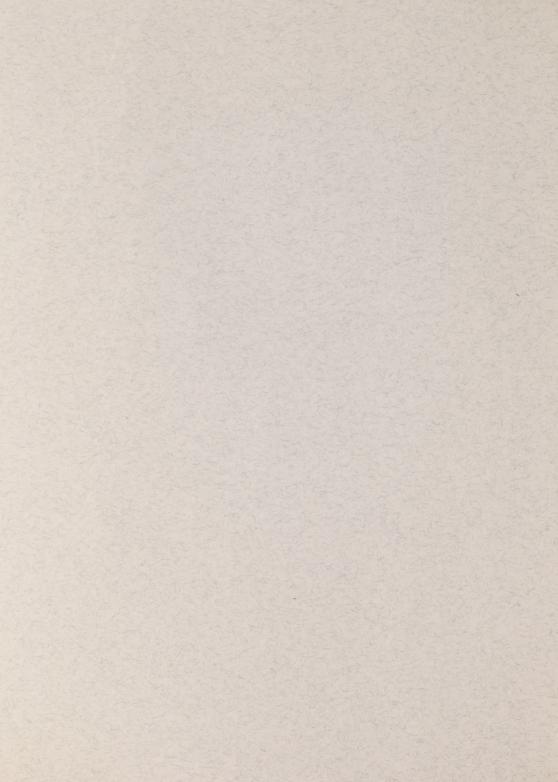


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CANADA

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## IMMIGRATION APPEAL CASES AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

### [1970] VOLUME 1

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ERRATA

#### DES ERRATA

- 1- Page 1 (English), line 3:
   add "respondent" on right.
- 2- Page 4 (French), line 1: change "sans" to "n'avoir".
- 3- Page 15 (French):
   .line 17: change "n'était" to "ne fusse";
   .line 35: insert "et qui déclara être
   prêt à lui aider" between "lant" and
   "en".
- 4- Page 16 (French), lines 21-22: remove "M. Stewart allégua aussi que, pour le Canada."
- 5- Page 29 (French), line 9 from bottom: change "oe" to "le".
- 6- Page 31 (French), line 4: change "Justice" to "le juge".
- 7- Page 37 (French), line 6 from bottom: change "lancer" to "fmettre".
- 8- Page 41 (French), line 8 from bottom: insert "est" between "enquête" and "présentée".
- 9- Page 45(French), line 8 from bottom: change "sont la 'preuve' de quelque chose" to "font preuve de rien."
- 10- Page 49 (French):
   .line 12: change "lui" to "elle";
   .line 13: remove "sauf pour le Ministre est,";
   .line 15: change the period for a coma;
   .line 17: insert "où un jugement irrégulièrement rendu sur la preuve"
- between "preuve" and "ne".

  1- Page 53 (French), line 4:
   insert "que" between "soutenu" and
- 2- Page 56 (French), line 21: remove one "demande".

"puisque".

- 1- Page 1 (anglaise), ligne 3:
   ajouter "respondent" à la droite.
- 2- Page 4 (française), ligne 1:
   remplacer "sans" par "n'avoir".
- 3- Page 15 (française):
   .ligne 17: remplacer "n'était" par "ne
   fusse";
   .ligne 35: insérer "et qui déclara être
   prêt à lui aider" entre "lant" et "en".
- 4- Page 16 (française), lignes 21-22:
   annuler "M. Stewart allégua aussi que,
   pour le Canada."
- 5- Page 29 (française), ligne 9 du bas: remplacer "oe" par "le".
- 6- Page 31 (française), ligne 4: remplacer "Justice" par "le juge".
- 7- Page 37 (française), ligne 6 du bas: remplacer "lancer" par "émettre".
- 8- Page 41 (française), ligne 8, du bas: insérer "est" entre "enquête" et "présentée".
- 9- Page 45 (française), ligne 8 du bas: remplacer "sont la 'preuve'de quelque chose" par "font preuve de rien."
- 10- Page 49 (française):
   .ligne 12: remplacer "lui" par "elle";
   .ligne 13: annuler "sauf pour le Ministre
   est,";
   .ligne 15: remplacer le point par une
  - .ligne 15: remplacer le point par une virgule;
  - .ligne 17: insérer "où un jugement irrégu lièrement rendu sur la preuve" entre "preuve" et "ne".
- 11- Page 53 (française), ligne 4:
   insérer "que" entre "soutenu" et "puisqu
- 12- Page 56 (française), ligne 21: annuler un "demande".

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1. Lonnie Verne WOODS,

appellant,

V .

The Minister of Manpower and Immigration,

Date of the decision: June 27, 1968; File: 68-5076.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, F. Glogowski.

SIO - discretion. - Substitution of Board's opinion - principles. - Right of appeal - scope. - Immigration Act: 5(p).

Held: "In the opinion of" has the same legal meaning as "in his discretion".

While the Board has power to set aside the discretionary decision of the SIO, in order to succeed it is for the appellant to show that he acted on a wrong principle or that on the evidence the decision was manifestly wrong.

The Board will not substitute its own opinion for that of the Special Inquiry Officer even if it does not agree with his decision, if it is clear on the face of the record that there is some evidence on which this opinion can reasonably be based.

Further, the Immigration Appeal Board places no restriction in respect of the right of appeal from a deportation order. Such right exists irrespective of the section or sections of the Immigration Act on which the deportation order is based. The right of appeal, therefore, exists in respect of a deportation order based on Section 5(p).

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

This is an appeal from a deportation order against Lonnie Verne Woods at Queenston, Ontario, on February 5, 1968, by Special Inquiry Officer J.A. McNamara, in the following terms:

- "(i) you are not a Canadian citizen;
- (ii) you are not a person having Canadian domicile;
- (iii) you are a member of the prohibited class of persons described in paragraph (p) of section 5 of the Immigration Act, in that, in my opinion, you are not a bona-fide non-immigrant."

1. Lonnie Verne WOODS,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 27 juin 1968; Dossier: 68:5076.

Coram: Mlle J.V. Scott, président, Jean-Pierre Houle, F. Glogowski.

Enquêteur spécial - discrétion. - Subrogation de l'opinion de la Commission - principes. - Droit d'appel - portée - Loi sur l'immigration: 5(p).

Arrêt: "Suivant l'opinion de" a le même sens juridique que "à son appréciation".

Tandis que la Commission a le pouvoir de réviser la décision discrétionnaire de l'enquêteur spécial, il appartient à l'appelant, afin de faire accueillir son appel, de montrer que l'enquêteur spécial s'est appuyé sur un principe erroné ou que la preuve amenant la décision était manifestement non-fondée.

S'il est évident que le dossier montre quelque preuve sur laquelle l'enquêteur spécial peut raisonnablement fonder son opinion, la Commission ne substitutera pas sa propre opinion pour celle de l'enquêteur spécial même si l'opinion de la Commission ne concorde pas avec celle de l'enquêteur spécial.

Par ailleurs, la Commission d'appel de l'immigration ne fait aucune restriction quant au droit d'appeler d'une ordonnance d'expulsion. Un tel droit existe indépendamment de l'article ou des articles de la Loi sur l'immigration sur lesquels s'appuient l'ordonnance d'expulsion. En conséquence le droit d'appeler d'une ordonnance d'expulsion basée sur l'article 5(p) est fondé.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue à Queenston, Ontario le 5 février 1968 par l'enquêteur spécial J.A. McNamara contre Lonnie Verne Woods l'appelant.

- "(i) you are not a Canadian citizen;
- (ii) you are not a person having Canadian domicile;

The minutes of the further examination forming part of the record before the Board, show that Mr. Woods is a 34 year old American citizen, and that he sought entry to Canada at Queenston, as a visitor, for a period of about one week. Mr. Woods was a passenger in a car driven by a Canadian citizen, one Dave Wade, and he informed the Special Inquiry Officer that he intended to stay with Mr. Wade at his home in Toronto during his visit. Mr. Woods is a professional musician, and freely admitted that he had had engagements in Canada as an entertainer. The purpose of his visit was to call on various night clubs with a view to obtaining further engagements. His instrument is a Hammond organ, which was not with him, and which he stated was at his home in Columbus, Ohio. At the time of the further examination, he had \$31.00 in his possession.

The Board finds, in the record before it, that the Special Inquiry Officer misdirected himself in forming the opinion that Mr. Woods was not a bona fide non-immigrant, since there is no evidence which would reasonably support such an opinion.

The words "in the opinion of" in Section 5(p) of the Immigration Act undoubtedly give the Special Inquiry Officer discretionary power, and if it is clear on the face of the record that there is some evidence on which this opinion can reasonably be based, the Board cannot substitute its opinion for that of the Special Inquiry Officer, even if it does not agree with his decision.

The Immigration Appeal Board Act places no restriction in respect of the right of appeal from a deportation order; such right exists irrespective of the section or sections of the Immigration Act on which the deportation order is based. A right of appeal, therefore, exists in respect of a deportation order based on Section 5(p) of the Immigration Act. The judgment of the Judicial Committee of the Privy Council, in M.N.R. v. Wright's Canadian Ropes Ltd (1947) Ac. 109 is of interest. That case concerned Section 6(2) of the Income War Tax Act, empowering the Minister to "disallow any expense which he in his discretion may determine to be in excess of what is reasonable...." The Minister determined that certain expenses claimed by the appellant company were not reasonable. Lord Greene, M.R. in delivering the judgment of the Judicial Committee, pointed out that the Income War Tax Act gave a right of appeal to the Exchequer Court in respect of Section 6(2), and continued: "This right of appeal must, in their Lordships' opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the court is entitled to examine the determination of the Minister and is not necessarily to be bound to accept his decision. Nevertheless, the limits within which the court is entitled to interfere are, in their Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle

(iii) you are a member of the prohibited class or persons in paragraph (p) of section 5 of the Immigration Act, in that, in my opinion, you are not a bona-fide nonimmigrant."

Le procès-verbal de l'enquête complémentaire inclus dans le dossier présenté devant la Commission montre, que M. Woods est un citoyen américain âgé de 34 ans, et qu'il a cherché à entrer au Canada à Queenston, en tant que visiteur pour une période d'une semaine environ. M. Woods était passager dans une automobile conduite par un dénoumé Dave Wade; M. Woods a déclaré à l'enquêteur spécial qu'il prévoyait demeurer chez M. Wade durant son séjour à Toronto. M. Woods est musicien professionnel et il a volontiers reconnu avoir eu des contrats pour se produire au Canada. Le but de sa visite était d'entrer en relation avec les propriétaires de différentes "boîtes de nuit" (night clubs) pour obtenir des engagements pour le futur. Il n'avait pas avec lui son instrument (un orgue Hammond); il a déclaré que celui-ci était chez lui à Columbus, Ohio. Au moment de l'enquête complémentaire M. Woods possédait \$31.00.

D'après le dossier présenté devant elle, la Commission déclare, que l'enquêteur spécial s'est mépris en alléguant que M. Woods n'était pas un non-immigrant de bonne fois, attendu qu'il n'y a aucune preuve supportant cette allégation.

À l'article 5(p) de la Loi sur l'immigration les mots "suivant l'opinion d'un enquêteur spécial" donnent indubitablement à l'enquêteur spécial un pouvoir discrétionnaire; et si le dossier montre clairement quelque preuve sur laquelle cette opinion peut être raisonnablement fondée, la Commission ne peut subroger son opinion pour celle de l'enquêteur spécial, même si l'opinion de la Commission diffère de celle de l'enquêteur spécial.

La loi de la Commission d'appel ne fait aucune restriction quant au droit d'appel d'une ordonnance d'expulsion; un tel droit existe indépendamment de l'article ou des articles de la Loi sur 1'immigration fondant 1'ordonnance d'expulsion. Le jugement rendu par le Comité judiciaire du Conseil Privé dans l'affaire M.N.R. c. Wright's Canadian Ropes Ltd (1947) A.C. 109 concerne la présente cause. L'affaire avait trait à l'article 6(2) de la loi sur les impôts "en temps de guerre" qui donnait au ministre le pouvoir de "to disallow any expense which in his discretion may be determined to be in excess of what is reasonable ... Le Ministre a décidé que certaines dépenses réclamées par la Société appelante n'étaient pas raisonnables. Lord Greene, M.R. en rendant le jugement au Comité judiciaire, a fait remarquer que la loi; Income War Tax Act accorde le droit d'appel devant la Cour de l'Échiquier en ce qui a trait à l'article 6(2), et il a poursuivi: 'This right of appeal must, in their Lordships' opinion, have been intended by the Legislature to be an effective right. This involves the consequence that the court is entitled to examine the determination of the Minister and is not necessarily to be bound to

of law, the court, in their Lordships' opinion, cannot interfere: the to the makes the Manister the sole judge of the fact of reasonableness .. normalcy and the court is not at liberty to substitute its own minion for his. But the power given to the Minister is not an thary one to be exercised according to his fancy. To quote the guage of Lord Halsbury in Sharp v. Wakefield, he must act 'according the rules of reason and justice, not according to private opinion... according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.... The court is, in their bordships' opinion, always entitled to examine the facts which are shown be evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. if, on the other hand, there is in the facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision."

It may be noted that the words "in the opinion of" used in Section 5(p) of the Immigration Act have the same legal meaning as "in his discretion".

The leading case on the power of an appellate court to set aside a discretionary decision of the Commissioner of Patents pursuant to Section 41(3) of the Patent Act. Martland J. in delivering the judgment of the Court, stated "while an appeal lies from that decision, in order to succeed it is for the appellant to show that he (the Commissioner of Patents) acted on a wrong principle, or that, on the evidence, the decision was manifestly wrong."

In the appeal presently before us, no evidence can be found in the summary of further examination to support the decision of Special Inquiry Officer McNamara. Mr. Woods wished to enter Canada for a legitimate purpose "contacts with performers and operators of premises hiring entertainers." He had adequate funds in his possession for the purpose stated, particularly in view of the fact that he intended to stay with a friend. There was no evidence that he intended to work in Canada, since his instrument, a Hammond organ, was, according to the record, at his home in Columbus, Ohio. The fact that he had an unloaded .38 calibre revolver in his possession, though noted at some length, appears to be tatally irrelevant to the question whether he was or was not a bona fide non-immigrant.

The Board, therefore, finds that the Special Inquiry Officer was "manifestly wrong" in deciding that the appellant was not a bona fide non-immigrant, and the appeal is allowed.

accept his decision. Nevertheless, the limits within which the court is entitled to interfere are, in their Lordships' opinion, strictly circumscribed. It is for the taxpayer to show that there is ground for interference, and if he fails to do so the decision of the Minister must stand. Moreover, unless it be shown that the Minister has acted in contravention of some principle of law the court, in their Lordships' opinion, cannot interfere: the section makes the Minister the sole judge of the fact of reasonableness or normalcy and the court is not at liberty to substitute its own opinion for his. But the power given to the Minister is not an arbitrary one to be exercised according to his fancy. To quote the language of Lord Halsbury in Sharp v. Wakefield, he must act 'according to the rules of reason and justice, not according to private opinion... according to law, and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.... The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one. If, on the other hand, there is in facts shown to have been before the Minister sufficient material to support his determination the Court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion. As has already been said, the Minister is by the subsection made the sole judge of the fact of reasonableness and normalcy, but, as in the case of any other judge of fact, there must be material sufficient in law to support his decision."

Notons que les mots "suivant l'opinion" utilisés à l'article 5(p) de la Loi sur l'Immigration ont juridiquement le même sens que "à son appréciation".

L'affaire Hoffman Laroche Ltd. c. Delmar Chemical Ltd. (1965) R.C.S. 575 repose sur le pouvoir d'une cour d'appel de réviser une décision discrétionnaire; cette cause semblerait être un précédent qui traite d'un appel d'une décision discrétionnaire du Directeur de Brevets conformément à l'article 41(3) de la Loi sur les Brevets. Martland J. rendant le jugement à la Cour a déclaré: "while an appeal lies from that decision, in order to succeed it is for the appellant to show that he (the Commissioner of Patents) acted on a wrong principle, or that, on the evidence, the decision was manifestly wrong."

Dans l'appel devant nous, aucune preuve ne peut être trouvée, dans le résumé de l'enquête complémentaire pour soutenir la décision de l'enquêteur spécial McNamara. Un objet légitime fondait le désir de M. Woods d'entrer au Canada: "contacts with performers and operators of premises hiring entertainers". Il possédait les fonds nécessaires pour la réalisation de son projet surtout quand on sait qu'il avait décidé de demeurer chez un ami. Il n'existe pas de preuve montrant qu'il avait l'intention de travailler au Canada, car selon le dossier son instrument, un orgue Hammond, était chez lui à Columbus, Ohio. Bien qu'on ait insisté sur le fait qu'il possédait un révolver calibre

It may be noted that written submissions filed on behalf of Mr. Woods, and dated respectively June 20th and June 24th 1968, were not received by the Board until July 2nd 1968, after the Board had reached its decision. The Board was therefore, unable to consider them.

Dated this 8th day of August 1968.

Concurred in by: Jean-Pierre Houle and F. Glogowski.

For the appellant: R.C. Southard, Barrister and Solicitor;

For the respondent: J.T. Pasman, Esq.

.38 non chargé, ce fait apparaît sans aucun rapport avec la question suivante: M. Woods était-il ou n'était-il pas un non-immigrant de bonne foi?

En conséquence la Commission déclare que l'enquêteur spécial avait "manifestement tort" (manifestly wrong) en décidant que l'appelant n'était pas un non-immigrant de bonne foi, et l'appel est accueilli.

Notons que des plaidoiries écrites de M. Woods ont été déposées au nom de M. Woods; elle étaient datées respectivement du 20 et 24 juin 1968; ces documents n'ont été reçus par la Commission que le 2 juillet 1968, alors que celle-ci avait rendu sa décision. La Commission n'a donc pu en tenir compte.

Daté ce 8<sup>e</sup> jour d'août 1968.

Ont souscrit: Jean-Pierre Houle et F. Glogowski.

Pour l'appelant: Me R.C. Southard; Pour l'intimé: M. J.T. Pasman. Georgios KLEMPETSANIS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: June 5, 1969, File: 68-6186.

Coram: Miss J.V. Scott, Chairman, J.A. Byrne, A.B. Weselak.

Evidence - sufficiency as to ship's departure - Crew Index Card. - Onus of proof as to order. - Eluding - what constitutes. - Immigration Act: 7(3), 19(1)(e)(ix); Immigration Regulations: 16 A; Immigration Appeal Board Act: 65(1).

Held: The certification by the Master that the Crew Index Card's contents are true and complete implies examination, and the word "true" includes in its meaning "correct" insofar as the knowledge of the Master goes, which would certainly include the vital fact that the subject of the card was a "deserter" from the vessel.

The Crew Index Card alone is not proof of departure. At best, it is corroborative evidence of departure.

Appellant has the burden of proving that the facts contained in the deportation order - in this case the statement that the vessel had departed - are not supported by evidence adduced at the inquiry, because of section 65(1) of the Immigration Act.

Failure to report for examination constitutes eluding.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

This is an appeal from a deportation order made the 11th day of December 1968, at London, Ontario, by Special Inquiry Officer L. Harper, in the following terms:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you eluded examination under this Act;
- 4) you are a person described in subsection (x) of paragraph (e) of subsection (1) of section 19 of the

2. Georgios KLEMPETSANIS,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 5 juin 1969; Dossier: 68:6186.

Coram: Mlle J.V. Scott, président, J.A. Byrne, A.B. Weselak.

Preuve - suffisance quant au départ du navire - carte indicatrice d'équipage. - Chargé de la preuve relative à l'ordonnance. - Se dérober - ce qui constitue. - Loi sur l'immigration: 7(3), 19(1) (e)(ix); Règlement sur l'immigration: 16A; Loi sur la Commission d'appel de l'immigration: 65(1).

Arrêt: Pour que le préposé du navire certifie que le contenu de la carte indicatrice d'équipage est vrai et complet, il faut un examen, et le mot "vrai" comprend dans son acception le mot "exact" (dans la mesure des connaissances du préposé) ce qui comprendrait certainement le fait d'importance capitale que le sujet de la carte avait déserté le navire.

La carte indicatrice d'équipage en tant que telle, n'est pas une preuve de départ. Tout au plus, elle corrobore la preuve d'un départ.

Selon l'article 65(1) de la Loi sur l'immigration, il incombe à l'appelant de prouver que les faits contenus dans l'ordonnance d'expulsion - dans cette affaire, la déclaration que le navire est parti - ne sont pas soutenus par la preuve apportée à l'enquête.

Ne pas se présenter à l'examen revient à se dérober.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue à London, Ontario le 11 décembre 1968 par l'enquêteur spécial L. Harper.

L'ordonnance d'expulsion dit:

"1) you are not a Canadian citizen;

2) you are not a person having Canadian domicile;

Immigration Act in that you came into Canada as a member of a crew and without the approval of an Immigration Officer remained in Canada after the departure of the vehicle in which you came into Canada.

5) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

At the hearing of his appeal the appellant appeared and testified and was represented by Mr. H. Stafford, Barrister and Solicitor. Mr. W. Bernhardt appeared on behalf of the respondent.

The relevant facts of this case are as follows: The appellant is a 29 year old citizen of Greece, unmarried, who arrived in Canada in June 1966, as a member of the crew of the "Archon Serafim". He left this vessel in Montreal, and without the approval of an immigration officer remained in Canada, working as a dishwasher and cook, until his arrest in December 1968.

At the hearing of his appeal, his counsel argued strenuously that the respondent had failed to prove the departure of the vessel "Archon Serafim", and consequently paragraph (4) of the deportation order was not in accordance with the law, since departure of the vessel is an essential ingredient of section 19(1)(e)(x) of the Immigration Act. The evidence adduced before the Special Inquiry Officer is to be found at page 6 of the Minutes of inquiry:

- "Q. When was the "ARCHON SERAFIM" scheduled to leave Canada?
- A. I could not answer that. I do not know.
- O. How long was the "ARCHON SERAFIM" to be in Canada?
- A. It was as long as it takes to unload, but I could not tell you for sure.
- Q. Did you have the consent of the Captain to leave the vessel?
- A. I took the privilege to just get out.
- Q. Were you on board the "ARCHON SERAFIM" when the vessel sailed from Montreal?
- A. No, I was not.
- Q. Where were you at that time?
- A. I stayed in Montreal for a few days. I do not know what date the boat left."

In addition, the Crew Index Card relating to Mr. Klempetsanis was filed as Exhibit "B" to the minutes of inquiry. In respect of this last, Mr. Stafford drew the Board's attention to section 16A (1) of the Immigration Regulations, Part I, which reads as follows:

- 3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you eluded examination under this Act;
- 4) you are a person described in subsection (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and without the approval of an Immigration Officer remained in Canada after the departure of the vehicle in which you came into Canada.
- 5) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

À l'audition de son appel l'appelant a comparu, a témoigné et était représenté par M. H. Stafford, avocat. M. W. Bernhardt occupait pour l'intimé.

Les faits pertinents à cette cause sont les suivants: l'appelant est un citoyen de Grèce, célibataire et âgé de vingt-neuf ans; il est arrivé au Canada en juin 1966 en tant que membre de l'équipage du "Archon Serafim". Il a débarqué du navire à Montréal, et sans l'autorisation d'un fonctionnaire à l'immigration est resté au Canada, où il a travaillé en tant que laveur de vaisselle et cuisinier jusqu'à son arrestation au mois de décembre 1968.

À l'audition de son appel, le conseiller juridique de M. Georgios Klempetsanis a contesté la validité de l'ordonnance d'expulsion en prétendant que l'intimé n'a pas pu prouver le départ du navire "Archon Serafim"; conséquemment le paragraphe (4) de l'ordonnance d'expulsion n'est pas en conformité avec la loi, attendu que le départ du navire est un point essentiel de l'article 19(1)(e) (x) de la Loi sur l'immigration. La mise en preuve devant l'enquêteur spécial se trouve à la page 6 du procès-verbal de l'enquête:

- "Q. When was the "ARCHON SERAFIM" scheduled to leave Canada?
- A. I could not answer that. I do not know.
- Q. How long was the "ARCHON SERAFIM" to be in Canada?
  A. It was as long as it takes to unload, but I could not tell you for sure.
- Q. Did you have the consent of the Captain to leave the vessel?
- A. I took the privilege to just get out.
- Q. Were you on board the "ARCHON SERAFIM" when the vessel sailed from Montreal?
- A. No, I was not.

"16 a(1) Each statement required by section 12 or 13 to be delivered by the master of a ship shall be certified by that master as having been examined by him and as being true, correct and complete."

Crew index cards are referred to in section 13(2) of the Regulations, which reads as follows:

"13. (2) The master of a ship referred to in section 12 shall forthwith upon the desertion, while in Canada, of any member of the crew, deliver to an immigration officer at the port in Canada nearest to the location where the said desertion came to the knowledge of the master, a crew index card, in the form prescribed by the Minister, setting out such particulars as may be required with respect to the said deserter."

Mr. Stafford pointed out that the crew filed as Exhibit "B", which is a printed form, bearing the legend "This form has been prescribed by the Minister of Citizenship and Immigration", did not comply with the mandatory wording of section 16 A(1) "shall be certified by the master as having been examined by him". Paragraph 11 of the crew index card, immediately above the signature of the master, reads "I certify that the contents of this crew index card are true and complete in every respect and correspond with the Crew Records of this vessel and this report is submitted in compliance with section 13(2) of the Immigration Regulations, Part I, 1962."

Mr. Stafford also referred to section 64(2) of the Immigration Act. which reads:

"64. (2) Every form or notice purporting to be a form or notice prescribed by the Minister shall be deemed to be a form or notice prescribed by the Minister under this Act unless called in question by the Minister or some person acting for him or for Her Majesty."

and went on to say (page 9 of the transcript of hearing of the appeal):
"I would take it from that, your honour, that any general form. But when you come to a section of a statute that sets out specification —this is not just a notice, this actually is a crew index card. There is very special wording in the statute which for some reason or other Department didn't even see fit to follow, and it's my respectful submission that section 16 A, not only makes the fact that this particular form does not prove the departure of the ship and there is no desertion under the decision of the Special Inquiry Officer unless there is a departure of the ship, and which they must prove. Suspicion, no matter how strong, its a fundamental principle of our common law, is not tantamount to proof and that the crew index card mentions nothing about departure. Thirdly, that even if the

Q. Where were you at that time?

A. I stayed in Montreal for a few days. I do not know what date the boat left."

De plus, la carte indicatrice de l'équipage se rapportant à M. Klempetsanis a été déposée comme pièce à l'appui "B" au procèsverbal de l'enquête. À cet égard M. Stafford a attiré l'attention de la Commission sur l'article 16 A(1) du Règlement sur l'immigration qui dit:

"Chaque déclaration que le préposé d'un navire est tenu de faire en vertu de l'article 12 ou 13 devra être certifiée par lui comme ayant été examinée par lui et comme étant vraie, exacte et complète."

Le Règlement sur l'immigration mentionne la carte indicatrice de l'équipage à l'article 13(2) qui dit:

"Le préposé d'un navire mentionné à l'article 12 doit immédiatement lorsqu'un membre de l'équipage déserte son navire, au Canada, remettre au fonctionnaire de l'immigration au port du Canada le plus proche de l'endroit ou ladite désertion a été portée à sa connaissance, une carte indicatrice de l'équipage, en la forme prescrite par le Ministre, contenant les détails qui pourront être requis à l'égard dudit déserteur."

M. Stafford a fait remarqué que la carte indicatrice de l'équipage, versée en preuve à l'appui "B" est une formule imprimée disant entre autre: "This form has been prescribed by the Minister of Citizenship and Immigration", n'est pas conforme au sens péremptoire du libellé de l'article 16 A(1): "devra être certifiée par lui comme ayant été examinée par lui". L'alinéa ll de la carte indicatrice d'équipage, juste au-dessus de la signature du préposé, dit: "I certify that the contents of this crew index card are true and complete in every respect and correspond with the Crew Records of this vessel and this report is submitted in compliance with section 13(2) of the Immigration Regulations, Part I, 1962."

 $\,$  M. Stafford mentionne aussi l'article 64(2) de la Loi sur l'immigration qui dit:

"64. (2) Chaque formule ou chaque avis donné comme étant une formule ou un avis que prescrit le Ministre est réputé une formule ou un avis ainsi prescrit aux termes de la présente loi à moins que le fait ne soit contesté par le Ministre ou par quelque personne agissant pour son compte ou pour sa Majesté."

et il a poursuivi en déclarant (page 9 de la transcription de l'audition de l'appel): "I would take it from that your honour, that any

The Board is of the opinion that the crew index card, in the irm prescribed by the Minister, substantially complies with section 16 A (1) of the Regulations. The certification by the Master that its contents are true and complete implies examination, and the word "true" includes in its meaning "correct" in so far as the knowledge of the Master goes, which would certainly include the vital fact that the subject of the card was a "deserter" from the vessel.

It must be pointed out that a crew index card alone is not proof of departure. In practice, it would appear that these cards are filed with the Department of Manpower and Immigration when the vessel leaves port, but there is nothing in the Immigration Act or regulations to require this. At best, a crew index card is corroborative evidence of departure.

The appellant has the burden of proving that the facts contained in the deportation order - in this case the statement that the vessel had departed, are not supported by the evidence adduced at the inquiry, since section 64(1) of the Immigration Act provides "Every document purporting to be a deportation order.... is, in any proceeding under or arising out of ... the Immigration Appeal Board Act, admissible in evidence as <a href="mailto:primalizer">primalizer</a> facie proof of the facts contained therein..."

In the instant appeal the appellant failed to satisfy this onus. Special Inquiry Officer Harper was justified in finding that the "Archon Serafim" had departed, in view of the appellant's answers to questions on this point, taken as a whole, the length of time which had elapsed between the appellant's arrival in Canada and the inquiry over two years -, and the crew index card.

It may be added that although the Board allowed the respondent to file a statutory declaration by the agent of the vessel that the Archon Serafim had in fact departed, it has ignored the document in reaching its decision on this point. Ex post facto proof of facts forming the grounds for a deportation order cannot be condoned.

The 4th paragraph of the deportation order is therefore in accordance with the law.

Paragraph 3 of the order, which reads:

"3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you eluded examination under this act;"

general form. But when you come to a section of a statute that sets out specification -- this is not just a notice, this actually is a crew index card. There is very special wording in the statute which for some reason or other the Department didn't even see fit to follow, and it's my respectful submittion that section 16A, not only makes the fact that this particular form does not prove the departure of the ship and there is no desertion under the decision of the Special Inquiry Officer unless there is a departure of the ship, and which they must prove. Suspicion, no matter how strong, its a fundamental principle of our common law, is not tantamount to proof and that the crew index card mentions nothing about departure. Thirdly, that even if the crew index card is correct in other respects, which I submit it isn't, it doesn't conform sufficiently with the statute that the signature of a master on the crew index card in itself would prove anything. Therefore, because of those reasons I submit that the Deportation Order is not a valid one."

La Commission estime que la carte indicatrice d'équipage en la forme prescrite par le Ministre, observe substantiellement les prescriptions de l'article 16 A(1) du Règlement sur l'immigration. Le préposé du navire a certifié que le contenu de la carte indicatrice d'équipage était vraie et complète ce qui implique un examen et le mot "vraie" inclus dans son acception le mot exact (dans la mesure des connaissances du préposé du navire), ceci comprendrait certainement le fait d'importance capitale que le sujet de la carte avait déserté le navire.

Remarquons que la carte indicatrice en tant que telle ne constitue pas une preuve de départ. En pratique, il semblerait que ces cartes sont déposées au ministère de la Main-d'oeuvre et de l'immigration quant le navire quitte le port, mais rien dans la Loi ou le Règlement ne prescrit ceci. Tout au plus, une carte indicatrice d'équipage est un témoignage qui corrobore un départ.

Il incombe à l'appelant de prouver que les faits contenus dans l'ordonnance d'expulsion - dans ce cas le fait que le navire était parti - ne sont pas soutenus par la preuve apportée à l'enquête puisque l'article 64(1) de la Loi sur l'immigration stipule que: "Tout document présenté comme étant une ordonnance d'expulsion ... est sous la procédure de la Loi sur la Commission d'appel de l'immigration ou en découlant, une preuve prima facie des faits y contenus ..." Dans l'instance l'appelant n'a pu satisfaire à cette exigence. En raison de l'ensemble des réponses de l'appelant aux questions sur le départ du navire, de la période de temps écoulée entre l'arrivée de l'appelant au Canada et l'enquête - plus de deux ans, et de la carte indicatrice d'équipage, l'enquêteur spécial Harper a déclaré à juste titre que le "Archon Serafim" était parti.

Il doit être ajouté, que bien que la Commission ait autorisé l'intimé à verser au dossier une déclaration statutaire du préposé du navire en disant que le Archon Serafim était effectivement parti, dans sa is also supported by the evidence. At page 6 of the Minutes of inquiry we find:

- "Q. Were you examined by a Canadian Immigration officer or a Customs officer before or after leaving the
- A. No. "
- Q. At what time of day or night did you go ashore?
  A. It was daytime, in the afternoon after I changed shift.
- Q. Did you leave the boat by the normal route via the gang plank or did you take some other route off the boat?
- A. I went out on the stairs of the boat, by the gang plank.
- Q. Did you report to an Immigration officer or call at an Immigration office at that time?
- A. No.
- O. Why did you fail to do so?
- A. I did not know I had to and I had no idea of the Immigration laws of Canada?
- Q. Is it correct that you entered Canada by eluding examination by a Canadian Immigration officer or Customs officer?
- A. Yes."

Mr. Stafford argued that the appellant had not "eluded examination" in that he had shore leave and left the ship in the normal manner. However, he failed to report to the Canadian Immigration authorities when he decided not to return to his ship, as he was required to do by section 7(3) of the Immigration Act, which reads:

"7. (3) Where any person who entered Canada as a nonimmigrant ceases to be a non-immigrant or to be in the particular class in which he was admitted as a nonimmigrant and, in either case, remains in Canada, he shall forthwith report such facts to the nearest Immigration officer and present himself for examination at such place and time as he may be directed and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada."

This failure to report constitutes eluding examination, and paragraph 3 of the deportation order is therefore in accordance with the law.

décision la Commission n'a pas tenu compte de ce document. La preuve ex post facto ne peut justifier les faits qui motivent une ordonnance d'expulsion.

Le quatrième alinéa de l'ordonnance d'expulsion est donc en conformité avec la loi.

L'alinéa 3 de l'ordonnance qui dit:

"3. you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you eluded examination under this Act;"

est aussi supporté par la preuve. Nous trouvons à la page 6 du procèsverbal de l'enquête:

- "Q. Were you examined by a Canadian Immigration officer or a Customs officer before or after leaving the vessel?

  A. No.
- Q. At what time of day or night did you go ashore?
  A. It was daytime, in the afternoon after I changed shift.
- Q. Did you leave the boat by the normal route via the gang plank or did you take some other route off the boat?
- A. I went out on the stairs of the boat, by the gang plank.
- Q. Did you report to an Immigration officer or call at an Immigration office at that time?
- A. No.
- Q. Why did you fail to do so?
- A. I did not know I had to and I had no idea of the Immigration laws of Canada?
- Q. Is it correct that you entered Canada by eluding examination by a Canadian Immigration officer of customs officer?
- A. Yes."

M. Stafford a soutenu que l'appelant ne s'est pas dérobé à l'examen (eluded examination) puisqu'il a débarqué et quitté le navire d'une façon normale. Toutefois nonobstant les prescriptions de l'article 7(3) de la Loi sur l'immigration l'appelant ne s'est pas présenter aux autorités canadiennes de l'immigration quant il a décidé de ne pas réembarquer sur son navire;

Since the evidence supports the first two grounds of the order, namely that the appellant is not a Canadian citizen and is not a person having Canadian domicile, all paragraphs of the order are in accordance with the law, and the appeal must be dismissed.

Turning to the Board's discretionary power under section 15 of the Immigration Appeal Board Act, Mr. Stafford sought to bring the appellant within that part of section 15(1)(b)(i) which reads as follows: "the existence of reasonable grounds for believing that if execution of the order (of deportation) is carried out the person concerned will be punished for activities of a political character." Questioned by his counsel at the hearing of his appeal, Mr. Klempetsanis testified (pp. 20-21 of the transcript of hearing:

- 'O. You naturally want to stay in Canada, do you?
- A. Yes, I've visited many other countries but I did not like the others as much as I did Canada, since the first moment I arrived here.
- Q. You like it better than Greece, do you?
- A. Well, I like Greece too, but my father does not have financial means to support us. That's why I want to stay here.
- Q. Are jobs hard to get in Greece?
- A. Oh, yes, it is very difficult especially, particularly now with that regime.
- Q. What regime?
- A. The regime.
- Q. Yes, but you mentioned to the interpreter that your father was a Royalist. Does that mean anything to you if you went back?
- A. Well, I was told that Royalists and everybody who is against the regime is persecuted. That's what I was told.
- Q. That's what he was told. He doesn't know from his own personal knowledge?
- A. No, I was told.

CHAIRMAN:

Who told you?

APPELLANT:

My father sent me a letter and let me know."

L'article 7(3) de la Loi sur l'immigration dit:

"7. (3) Lorsqu'une personne qui est entrée au Canada en qualité de non-immigrant cesse d'être non-immigrant ou d'apartenir à la catégorie particulière dans laquelle elle a été admise à ce titre et, dans l'un ou l'autre cas demeure au Canada, elle doit immédiatement signaler ces faits au fonctionnaire à l'immigration le plus rapproché et se présenter pour examen au lieu et temps qui lui sont indiqués, et elle est réputée, pour les objets de l'examen et à toutes autres fins de la présente loi, une personne qui cherche à être admise au au Canada."

En ne se présentant pas il s'est soustrait à l'examen et le 3ième alinéa de l'ordonnance d'expulsion est donc en conformité avec la loi.

Puisque la preuve soutient les deux premiers motifs de l'ordonnance, à savoir l'appelant n'est pas un citoyen canadien et n'est pas une personne ayant acquis le domicile canadien, tous les alinéas de l'ordonnance sont en conformité avec la loi et l'appel doit être rejeté.

M. Stafford a, ensuite, cherché à montrer que l'appelant entrait dans la catégorie de personnes décrite à l'article 15(1)(b)(i) de la Loi sur l'immigration afin que la Commission utilise son pouvoir discrétionnaire selon l'article 15 de la Loi sur la Commission d'appel de l'immigration. L'article 15(1)(b)(i) de la Loi dit: "l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politiques." Interrogé par son avocat à l'audition de l'appel M. Klempetsanis a déclaré (pp. 20-21 de la transcription de l'audition):

- "Q. You naturally want to stay in Canada, do you?
  A. Yes, I've visited many other countries but I did not like the others as much as I did Canada, since the first moment I arrived here.
- Q. You like it better than Greece, do you?
  A. Well, I like Greece too, but my father does not have financial means to support us. That's why I want to stay here.
- Q. Are jobs hard to get in Greece?A. Oh, yes, it is very difficult especially, particularly now with that regime.
- Q. What regime?
  A. The regime.

#### and at page 22:

- 'Q. And according to your understanding today, I take it, things are different in your country than when you were there, is that correct?
- A. Things are worse now, in Greece.
- O. Yes. Well, I said they were different.

A. Yes."

Questioned by the Chairman, (pp. 33-34) transcript of hearing:

- "Q. You have also told us that you might be in trouble if deported to Greece. What kind of trouble?
- A. We might be into trouble because our family likes the king and we are royalists and today the regime in Greece does not like royalists.
- O. What does your father do?
- A. He works in a farm.
- O. Whereabouts in Greece is the farm?
- A. At Soficon, Corinth.
- Q. That is in the south part of Greece, is it?
- Q. Is this farm in a town or near a town or village?
  A. No. It is in a village.
- Q. How far away is the nearest big town or city? A. Corinth.
- Q. How far away is Corinth?
- A. You mean by bus?
- Q. How many miles or kilometers?
- A. About fifty miles.
- Q. Miles? Did you ever belong to a political party when you were in Greece?
- A. No
- Q. Did your father?
- A. No.
- Q. Did you ever attend any political meetings?
- A. No.
- Q. Were you interested in politics when you were in Greece?
- A. Not very much. I was a Royalist.

- Q. Yes, but you mentioned to the interpreter that your father was a Royalist. Does that mean anything to you if you went back.
- A. Well, I was told that Royalists and everybody who is against the regime is persecuted. That's what I was told.
- Q. That's what he was told. He doesn't know from his own personal knowledge?

A. No, I was told.

#### CHAIRMAN:

Who told you?

#### APPELANT:

My father sent me a letter and let me know."

#### et à la page 22:

- "Q. And according to your understanding today, I take it, things are different in your country than when you were there, is that correct?
- A. Things are worse now, in Greece.
- Q. Yes. Well, I said they were different. A. Yes."

#### Interrogé par le président, (pp. 33-34) transcription de l'audition:

- ''Q. You have also told us that you might be in trouble if deported to Greece. What kind of trouble?
- A. We might be into trouble because our family likes the king and we are royalists and today the regime in Greece does not like royalists.
- Q. What does your father do?
- A. He works in a farm.
- Q. Whereabouts in Greece is the farm?
- A. At Soficon, Corinth.
- Q. That is in the south part of Greece, is it?
- Q. Is this farm in a town or near a town or village? A. No. It is in a village.
- ${\tt Q.}$  How far away is the nearest big town or city?  ${\tt A.}$  Corinth.

- Q. At the time you lived in Greece, the King was on the throne, is that right?
- A. Yes.
- Q. Now, you told us your father wrote you when you were in this country and told you that things were bad in Greece. Did he tell you anything about any trouble that he has had? Has he had any trouble with the present government?

A. I was -- my father told me that this regime, the regime now existing in Greece, arrests all Royalists because Royalists try to bring the King back.

- Q. Has your father been arrested?
- A. He just wrote me that he was in trouble, that's all.
- Q. He said "He", that is your father, was in trouble? A. Yes. He wrote me that he was into trouble.
- ${\bf Q}\:.$  But you don't know what the trouble was? A. No.
- Q. Have you had a letter from him since you got that letter?
  A. If I have received any other letter from him?

Q. Yes. A. Yes. Oh, yes, he sends me letters regularly."

Mr. Stafford also filed as Exhibit "B" at the hearing of the appeal, certain magazine articles dealing generally with conditions in Greece under the present regime, which are, of course, quite worthless as evidence. In the Board's opinion no reasonable grounds were shown for believing that the appellant will be punished for activities of a political character if returned to Greece.

No evidence whatsoever was adduced to prove that the appellant will suffer unusual hardship if returned to Greece, or the existence of compassionate of humanitarian grounds which would warrant the granting of special relief in this case. The appellant has no close relatives in Canada and has formed no ties here which would be severed is deportation is carried out. He has done his military service in Greece and his immediate family is there.

The Board, therefore, directs that the deportation order be executed as soon as practicable.

Dated at Ottawa this 13th day of August 1969.

Concurred in by: J.A. Byrne and A.B. Weselak.

For the appellant: H. Stafford, Barrister and Solicitor;

For the respondent: W. Bernhardt, Esq.

- Q. How far away is Corinth?
- A. You mean by bus?
- Q. How many miles or kilometers?
- A. About fifty miles.
- Q. Miles? Did you ever belong to a political party when you were in Greece?
- A. No.
- Q. Did your father?
- A. No.
- Q. Did you ever attend any political meetings?
- A. No.
- Q. Were you interested in politics when you were in Greece?
- A. Not very much. I was a Royalist.
- Q. At the time you lived in Greece, the King was on the throne, is that right?
- A. Yes.
- Q. Now, you told us your father wrote you when you were in this country and told you that things were bad in Greece. Did he tell you anything about any trouble that he has had? Has he had any trouble with the present government?
- A. I was -- my father told me that this regime, the regime now existing in Greece, arrests all Royalists because Royalists try to bring the King back.
- Q. Has your father been arrested?
- A. He just wrote me that he was in trouble, that's all.
- Q. He said "He", that is your father, was in trouble?
- A. Yes. He wrote me that he was into trouble.
- Q. But you don't know what the trouble was?
- A. No.
- Q. Have you had a letter from him since you got that letter?
- A. If I have received any other letter from him?
- Q. Yes.
- A. Yes. Oh, yes, he sends me letters regularly."
- M. Stafford a apporté en pièce à l'appui "B" à l'audition de l'appel certains articles de revues traitant généralement des conditions de vie en Grèce sous le régime actuel; ceux-ci sont, bien sûr, de peu de poids en tant que preuve. La Commission estime qu'aucun motif raisonnable n'a été présenté laissant croire que l'appelant sera puni pour des activités d'un caractère politique s'il retournait en Grèce.

Aucune preuve de quelque sorte que ce soit n'a été présentée prouvant que l'appelant sera soumis à de graves tribulations s'il retourne en Grèce, ou indiquant l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui justifieraient l'octroi d'un redressement spécial. L'appelant n'a pas de parenté au Canada et n'a pas créé de lien qui serait tranché par l'exécution de l'ordonnance d'expulsion. Il a effectué son service militaire en Grèce où est sa famille immédiate.

En conséquence la Commission ordonne que l'ordonnance soit exécutée aussitôt que possible.

Ottawa, le 13 août 1969.

Ont souscrit: J.A. Byrne et A.B. Weselak.

Pour l'appelant: Me H. Stafford; Pour l'intimé: M.W. Bernhardt. 3. KO Fu Hwa, also known as Fu Hwa Ko

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: July 25, 1969; File: 69-585.

Coram: J.C.A. Campbell, Vice-Chairman, A.B. Weselak, F. Glogowski.

Examination - Immigration Officer's discretion in determining whether he "is satisfied". - Substitution of Board's opinion - basis. - Immigration Regulations: 34(3)(f); 2(b) of Schedule A.

Held: Parliament has by apt words indicated that the exercise of any discretionary powers in determining whether he "is satisfied" pursuant to section 2(b) of Schedule A of Immigration Regulations lies with the Immigration officer. Such officer must consider the evidence before him and form an opinion as to whether he is satisfied. The Board therefore applies the principles set out in the Gioulekas case (reported) and finds that while it has power on appeal to review the Immigration officer's decision it will only, considering the evidence before it, interfere with the decision of the Immigration officer if it can be shown that the officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle.

The judgment of the Board was delivered by:

#### A.B. Weselak:

This is an appeal from a Deportation Order dated 3 April 1969, made by Special Inquiry Officer A.K. Beattie at the Canadian Immigration Building, Vancouver, B.C., in respect of the appellant KO Fu Hwa also known as Fu Kwa KO, in the following terms:

- "i) you are not a Canadian citizen,
- ii) you are not a person having Canadian domicile,
- iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or the Regulations by reason of the fact that:
  - (a) in the opinion of an Immigration Officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A as required by paragraph (f)

KO Fu Hwa, aussi connu sous le nom de Fu Hwa Ko,

appelant,

v.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 25 juillet 1969; Dossier: 69-585.

Coram: J.C.A. Campbell, vice-président, A.B. Weselak, F. Glogowski.

Examen - Discrétion du fonctionnaire à l'immigration qui détermine s'il "est persuadé". - Substitution d'opinion de Commission - Fondement - Règlement sur l'immigration: 34(3)(f); 2(b) à l'Annexe A.

Arrêt: Le Parlement, en des mots appropriés, a fait savoir que l'exercice de tous pouvoirs discrétionnaires par un fonctionnaire à l'immigration qui détermine s'il "est persuadé" selon l'article 2(b) de l'Annexe A du Règlement sur l'immigration incombe à ce fonctionnaire. Celui-ci doit considérer la preuve apportée devant lui et se former une opinion. En conséquence, la Commission applique les principes définis dans la cause Gioulekas (rapportée) et déclare que, bien qu'en appel elle ait le pouvoir de réviser la décision d'un fonctionnaire à l'immigration, elle ne fera que - considérant la preuve devant elle - réviser la décision du fonctionnaire à l'immigration, si il peut être prouvé que le fonctionnaire est arrivé à une conclusion manifestement erronée ou s'il agi au nom d'un principe mauvais.

Le jugement de la Commission fut rendu par:

#### A.B. Weselak:

Appel d'une ordonnance d'expulsion rendue à Vancouver dans l'édifice de l'immigration canadienne, le 3 avril 1969, par l'enquêteur spécial A.K. Beattle, contre l'appelant Ko Fu Hwa aussi connu sous le nom de Fu Hwa Ko. L'ordonnance d'expulsion dit:

"i) You are not a Canadian citizen,

ii) You are not a person having Canadian domicile,

iii) You are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act of the Regulations by reason of:

(a) Paragraph (b) of subsection (4) of section 34 of the Immigration Regulations, Part I in that in the opinion of the Immigration officer you would not on application be issued an immigrant visa or letter of pre-examination if outside Canada.

of subsection (3) of section 34 of the Immigration Regulations, Part I, of the

Immigration Act.

(b) you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I, of the Immigration Act.

(c) you passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration regulations, Part I, of the Immigration Act."

The appellant was not present but was represented by his counsel Mr. T.W. Stewart of John Taylor Associates, Barristers. Mr. E. Sojonky. barrister, represented the respondent.

The appellant is a thirty year old citizen of the Republic of China. He is married with his wife and son being domiciled in Taiwan. He stated at the Inquiry that he successfully completed nine years of school. At the Inquiry he was not certain of the dates relating to his work but it would seem that after finishing his schooling he arrived in Hong Kong in 1951 where he worked as a glass blower. He then went to Taiwan in 1955 where he was re-united with his family. In Taiwan he was employed as a messenger for approximately two years and as a bookkeeper for another two years and in 1958 he enlisted with the Chinese Air Force where he was a radar operator and was discharged in 1961. After discharge he worked in a restaurant as a cook for approximately three years and then went to Costa Rica arriving there in 1965. He claims to have become a permanent resident of that country sometime in 1968. In Costa Rica he was employed as a cook in a restaurant comprising six chief cooks including himself and fourteen waiters and waitresses. His wife and son remained in Taiwan and did not join him in Costa Rica. Mr. Ko entered Canada as a non-immigrant on 30 May 1968 for a period to expire 18 July 1968 and applied for permanent residence on 16 July 1968. At the time of his entry he had about \$1,600.00 U.S. with him. He met a friend, one C.C. Lu, who was a very good friend of the appellant's father and who stated he was willing to assist the appellant by borrowing \$10,000.00 (Canadian) for the use of the appellant to assist him to become established in business in this country.

The appellant's application for permanent residence was processed and he received a total of forty-five units. At the time of the original assessment the assessing officer had in mind the fact that Mr. Ko stated he wished to establish himself in business but considered in the light of the information furnished by Mr. Ko that he should not be credited with twenty-five units under Section 2 of Schecule "A". As a result of evidence given at the Inquiry a reassessment was made and the assessing officer again refused to credit Mr. Ko with twenty-five units under Section 2 of Schedule "A".

(b) You are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of section 28 of the Immigration Regulations, Part I.

(c) Your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I."

L'appelant n'était pas présent mais était représenté par M. T.W. Stewart de John Taylor Associates, conseillers juridiques. M. E. Sojonky occupait pour l'intimé.

L'appelant, citoyen de la République de Chine, est âge de trente Il est marié; sa femme et son fils demeurent à Taiwan. A l'enquête il a déclaré être allé à l'école pendant neuf ans. Bien qu'il 'n'était pas certain des dates situant le commencement de son travail, il semblerait qu'après avoir quitté l'école il soit allé à Hong-Kong en 1951 où il travailla en tant que souffleur de verre. Ensuite, il est allé rejoindre sa famille à Taiwan en 1955. A Taiwan il fut deux ans commis de bureau, ensuite il fut teneur de livre de comptabilité pendant deux ans; en 1958 il s'enrôla dans l'aviation chinoise où il fut opérateur de radar et fut démobilisé en 1961. Après sa démobilisation il a travaillé dans un restaurant en tant que cuisinier pendant trois ans environ; ensuite il est allé à Costa Rica où il est arrivé en 1965. Il déclare être devenu résident permanent de ce pays vers 1968. A Costa Rica il fut employé en tant que cuisinier dans un restaurant comptant six chefs cuisiniers avec lui et quatorze serveurs et serveuses. Sa femme et son fils sont restés à Taiwan et ne l'ont pas rejoint à Costa Rica. Le 30 mai 1968, M. Ko est entré au Canada en qualité de non-immigrant; il avait un permis de séjour qui expirait le 18 juillet 1968; le 16 juillet il fit une demande de résidence permanente. Quand il entra au Canada il avait sur lui environ \$1,600.00 US. Il rencontra un ami, un dénommé C. C. Lu, qui était un très bon ami du père de l'appelant en lui avançant \$10,000.00 (canadiens) afin que l'appelant s'établissent à son propre compte.

La demande de résidence permanente faite par l'appelant a été examinée et il a reçu un total de quarante cinq points. Lors de la première appréciation le fonctionnaire chargé de l'appréciation a pensé au fait que M. Ko déclara vouloir s'établir à son propre compte mais considérant les renseignements fournis par M. Ko, le fonctionnaire n'a pu attribué à celui-ci les vingt-cinq points que prévoient les dispositions de l'article 2 à l'Annexe "A". Ainsi que le montre le témoignage fourni à l'enquête une réappréciation a été faite et le fonctionnaire chargé de l'appréciation refusa, à nouveau, d'attribué à M. Ko les vingt-cinq points que prévoit l'article 2 à l'Annexe "A".

Counsel for the appellant attacked the order on the basis that his client should have been given twenty-five units of assessment under Section 2 of Schedule "A". He argued that the evidence showed Mr. Ko could obtain \$20,000.00 which he probably would not be called upon to repay as the loan of the money would be arranged between Mr. Lu and Mr. Ko's father. Further Mr. Ko and the present proprietor of the Colden Crown Restaurant were intending to form a Limited Company in which Mr. Ko would have a one-third interest. If Mr. Ko entered into the Golden Crown Restaurant business he would look after all the affairs in the kitchen, the personnel and the cooking. Mr. Stewart submitted that as Mr. Ko could show that he had access to funds. the experience and as he does not have to repay the loan it is indicative that Mr. Ko has a reasonable chance of being successful in establishing a business in Canada and is therefore entitled to twenty-five units of assessment under Section 2 of Schedule "A". In the alternative Mr. Stewart asked the Board to quash the order and direct the grant of landing on compassionate and humanitarian grounds as he has shown that he is bona fide in his intention to set up the business and remain in Canada. Mr. Stewart submitted that Mr. Ko would also be a definite benefit to Canada generally and particularly to Vancouver.

Mr. Sojonky for the respondent argued that the evidence showed Mr. Ko did not intend to establish a business, rather he intended to infuse capital into a going concern. He pointed out to the Board that there was no evidence to support the statement that arrangements had been made between Mr. Lu and Mr. Ko's father in respect of the loan referred to by Mr. Ko. He argued that Mr. Ko had been assessed as a cook and that really all he intended to do was to assist in establishing a business.

The Inquiry was first convened on the 5th November 1968 and adjourned sine die the same day. On the 18th December the following memorandum was sent by Mr. A.H. Wright, Immigration officer and author of the Section 23 report, dated 4 October 1968 to the Special Inquiry Officer which reads as follows:

#### MEMORANDUM

To: Special Inquiry Officer, Vancouver, B.C.

"rom: A.H. Wright, Immigration Officer, Our file No. P-CH-54371 Vancouver, B.C.

Subject: KO FU HWA - Assessment as an Immigrant. Date: 18 December

- 1. This refers to my report of 4 October 1968, under Section 23 of the Immigration Act concerning Ko Fu Hwa.
- 2. It is understood that Ko Fu Hwa, through his counsel, has stated that he should have been given a credit of twenty-five

Le conseiller juridique de l'appelant a contesté l'ordonnance en montrant que son client aurait dû bénéficié des vingt-cinq points d'appréciation que prévoient les dispositions de l'article 2 à l'Annexe "A". Il soutint que le témoignage montre que M. Ko aurait pu obtenir \$20,000.00, somme que M. Ko n'aurait probablement pas eu à rembourser puisque l'emprunt aurait était arrangé entre M. Lu et le père de M. Ko. De plus M. Ko et le propriétaire actuel du restaurant le Golden Crown avaient l'intention d'étabir une Société à responsabilité limitée dans laquelle M. Ko aurait obtenu un tiers des parts. Si M. Ko était devenu un des associés du Golden Crown Restaurant, il se serait occupé des problèmes de la cuisine, tant du côté du personnel que de la préparation des repas. M. Stewart a allégué que comme M. Ko avait de l'expérience, il pouvait obtenir des fonds, qu'il n'avait pas à rembourser, il a une chance raisonnable de réussir à s'établir à son propre compte au Canada et il a donc droit aux vingt-cinq points d'appréciation en vertu de l'article 2 l'Annexe "A". D'un autre côté, M. Stewart a demandé à la Commission d'annuler l'ordonnance d'expulsion et qu'il soit accordé à M. Ko le droit de débarquement en raison de l'existence de motifs de pitié et de considérations d'ordre humanitaire, attendu que M. Ko est de bonne foi et qu'il a l'intention d'établir un commerce et de demeurer au Canada. M. Stewart allégua aussi que, pour le Canada. M. Stewart allégua aussi que, pour le Canada en général et pour Vancouver en particulier, il serait avantageux que M. Ko ne soit pas expulsé.

M. Sojonky pour l'intimé soutint que le témoignage montre que M. Ko n'avait pas l'intention de s'établir à son propre compte, mais plutôt d'investir du capital dans une affaire établie. Il a fait remarqué à la Commission qu'il n'y a aucune preuve pour supporter la déclaration de M. Ko au sujet des arrangements, en vue de l'emprunt, pris entre son père et M. Lu. M. Sojonky a soutenu que M. Ko a été apprécié en tant que cuisinier et tout ce qu'il avait réellement l'intention de faire était d'être employé dans une affaire établie.

L'enquête a été tenue, en premier lieu, le 5 novembre 1968 et ajournée, sine die, le même jour. Le 18 décembre le memorandum suivant a été envoyé par M. A.H. Wright, fonctionnaire à l'immigration et auteur du rapport selon l'article 23; le memorandum à l'enquêteur spécial est daté du 4 octobre 1968 et dit:

#### **MEMORANDUM**

To: Special Inquiry Officer, Vancouver, B.C.

From: A.H. Wright, Immigration Officer, Our file No. P.CH-54371 Vancouver, B.C.

Subject: KO FU HWA - Assessment as an Immigrant. Date: 18 December 1968

units under Section 2 of Schedule A of the Immigration Regulations, Part I, instead of being assessed under the factors set out in paragraph (e) and (d) of Section 1 thereof. This suggestion was first made to me during my assessment interview with Ko Fu Hwa on 19 September 1968. Ko Fu Hwa was not credited with twenty-five units in this case, because he was unable to satisfy me that he had sufficient financial resources to establish himself in business, and that he had sufficient experience to give such a business a reasonable chance of being successful.

- According to information given to me by Ko Fu Hwa during the aforementioned interview, and information contained in his application for permanent residence in Canada (IMM. O.S.8), his first experience as a cook was during 1961 or 1962 in the Nanking Restaurant in Taipei. He was employed first as an apprentice cook and later as a cook at that establishment for approximately three years, leaving of his own accord in 1964. He was unemployed for a few months, and then early in 1965, secured employment as a household servant with a Chinese Foreign Service Officer stationed in Costa Rica. His duties there included cooking as well as other household chores. He left that employment in 1966 when the Chinese Foreign Service Officer was transferred elsewhere. Later in 1966, he secured employment as a Chief Cook with the Cheong Kong Restaurant in Costa Rica. He was one of six Chief Cooks at that restaurant where the total staff numbered about twenty. I assume that all the qualified cooks at the Cheong Kong Restaurant were classified as "Chief" Cooks. This assumption was based on Mr. Ko's statement that the only other staff were waiters and waitresses.
- 4. The fact that Mr. C.C. Lu was willing to loan Canadian \$10,000.00 to Mr. Ko is not, in my experience, an indication that Mr. Ko has a reasonable chance of establishing a successful business. Mr. Lu's investment would, no doubt, be well protected by a written agreement wherein Mr. Lu would control the business until the loan was repaid. Therefore, it would be Mr. Lu's business management experience that would give the business a reasonable chance of being successful. No written agreement between Mr. Lu and Mr. Ko was presented to me for consideration. If such an agreement does not exist, then Mr. Lu indicates a lack of knowledge of good business principles.
- 5. Further to the preceding paragraphs, Mr. Ko indicated during our aforementioned assessment interview, that even if he were to borrow \$10,000.00 from Mr. Lu, this would only give him a small share in the venture. Such being the case, he would not be establishing a business, but rather, assisting in such establishment.

- 1. This refers to my report of 4 October 1968, under Section 23 of the Immigration Act concerning Ko Fu Hwa.
- 2. It is understood that Ko Fu Hwa, through his counsel, has stated that he should have been given a credit of twenty-five units under Section 2 of Schedule A of the Immigration Regulations, Part I,instead of being assessed under the factors set out in paragraph (e) and (d) of Section 1 thereof. This suggestion was first made to me during my assessment interview with Ko Fu Hwa on 19 September 1968. Ko Fu Hwa was not credited with twenty-five units in this case, because he was unable to satisfy me that he had sufficient financial resources to establish himself in business, and that he had sufficient experience to give such a business a reasonable chance of being successful.
- According to information given to me by Ko Fu Hwa during the aforementioned interview, and information contained in his application for permanent residence in Canada (IMM. O.S.8), his first experience as a cook was during 1961 or 1962 in the Nanking Restaurant in Taipei. He was employed first as an apprentice cook and later as a cook at that establishment for approximately three years, leaving of his own accord in 1964. He was unemployed for a few months, and then early in 1965, secured employment as a household servant with a Chinese Foreign Service Officer stationed in Costa Rica. His duties there included cooking as well as other household chores. He left that employment in 1966 when the Chinese Foreign Service Officer was transferred elsewhere. Later in 1966, he secured employment as a Chief Cook with the Cheong Kong Restaurant in Costa Rica. He was one of six Chief Cooks at that restaurant where the total staff numbered about twenty. I assume that all the qualified cooks at the Cheong Kong Restaurant were classified as "Chief" Cooks. This assumption was based on Mr. Ko's statement that the only other staff were waiters and waitresses.
- 4. The fact that Mr. C.C. Lu was willing to loan Canadian \$10,000.00 to Mr. Ko is not, in my experience, an indication that Mr. Ko has a reasonable chance of establishing a successful business. Mr. Lu's investment would, no doubt, be well protected by a written agreement wherein Mr. Lu would control the business until the loan was repaid. Therefore, it would be Mr. Lu's until the loan was repaid. Therefore, it would be Mr. Lu's business management experience that would give the business a reasonable chance of being successful. No written agreement between Mr. Lu and Mr. Ko was presented to me for consideration. If such an agreement does not exist, then Mr. Lu indicated a lack of knowledge of good business principles.
- 5. Further to the preceding paragraphs, Mr. Ko indicated during our aforementioned assessment interview, that even if he were to borrow \$10,000.00 from Mr. Lu, this would only give him a small share in the venture. Such being the case, he would not be establishing a business, but rather, assisting in such establishment.

A further affidavit, Exhibit "E" to the Minutes of Inquiry dated 3 February 1969, was filed by Mr. Wright which reads as follows:

" CAN	NADA	)	IN THE MATTER OF The Immigration
Province of	British Columbia	)	Act and in the matter of the
at \	/ANCOUVER	)	Application of KO FU HWA (Chinese)
		)	for permanent admission to Canada.

### STATUTORY DECLARATION

I, Austin H. Wright, Immigration Officer,

in the city of Vancouver,

in the province of British Columbia, do solemnly declare that:

I made a report to a Special Inquiry Officer dated 18 December 1968, concerning my assessment of KO FU HWA, concerning his application for permanent residence in Canada;

AND in the aforementioned report, I stated that KO FU HWA, through his solicitor, had requested he be given a credit of 25 units of assessment under Section 2 of Schedule A of the Immigration Regulations Part I, instead of being assessed under the factors set out in paragraphs (c) and (d) of Section 1 thereof;

AND in the aforementioned report I stated that KO FU HWA was not credited with 25 units as he had requested because he was unable to satisfy me that he had sufficient financial resources to establish himself in business and sufficient experience to give such a business a reasonable chance of being successful;

AND at the request of John A.W. Drysdale, solicitor, for the said KO FU HWA, I again interviewed KO FU HWA in Vancouver aforesaid on 24 January 1969 for the purpose of reviewing old evidence and receiving new evidence;

AND as a result of the said interview on 24 January 1969, I have again concluded that KO FU HWA could not be given a credit of 25 units under Section 2 of Schedule A of the Immigration Regulations Part I, instead of being assessed under the factors set out in paragraphs (c) and (d) of Section 1 thereof, because he was unable to satisfy me that:

Un affidavit supplémentaire, pièce à l'appui "E" datée du 3 février 1969 a été versée au procès-verbal de l'enquête par M. Wright. Cet affidavit dit:

'' CANADA	) IN THE MATTER OF THE Immigration
Province of British Columbia	) Act and in the matter of the
At VANCOUVER	) Application of KO FU HWA (Chinese)
	) for permanent admission to Canada.

# STATUTORY DECLARATION

I, Austin H. Wright, Immigration,

in the city of Vancouver,

in the province of British Columbia, do solemnly declare that:

I made a report to a Special Inquiry Officer dated 18 December 1968, concerning my assessment of KO FU HWA, concerning his application for permanent residence in Canada;

AND in the aforementioned report, I stated that KO FU HWA, through his solicitor, had requested he be given a credit of 25 units of assessment under Section 2 of Schedule A of the Immigration Regulations Part I, instead of being assessed under the factors set out in paragraphs (c) and (d)of Section 1 thereof;

AND in the aforementioned report I stated that KO FU HWA was not credited with 25 units as he had requested because he was unable to satisfy me that he had sufficient financial resources to establish himself in business and sufficient experience to give such a business a reasonable chance of being successful;

AND at the request of John A.W. Drysdale, solicitor, for the said KO FU HWA, I again interviewed KO FU HWA in Vancouver aforesaid on 24 January 1969 for the purpose of reviewing old evidence and receiving new evidence;

AND as a result of the said interview on 24 January 1969, I have again concluded that KO FU HWA could not be given a credit of 25 units under Section 2 of Schedule A of the Immigration Regulations Part I, instead of being assessed under the factors set out in paragraphs (c) and (d) of Section 1 thereof, because he was unable to satisfy me that:

- (a) he does, in fact, intend to establish a business in Canada;
- (b) he has sufficient financial resources to establish himself in business; and
- (c) he has the experience and ability necessary to give any business he might establish a reasonable chance of success.

AND I make this solemn declaration conscientiously believing it to be true

AND knowing that it is of the same force and effect as if made under oath

AND by virtue of "THE CANADA EVIDENCE ACT".

DECLARED before me

at the city of Vancouver

in the province of British Columbia

this third day of February 1969.

(Sgd.)

(Sgd.)

A.H. Wright, Immigration Officer."

(Sgd.)

)

(Sgd.)

J.H. Betteridge, Immigration Officer.)

The relevant Section in the Regulations dealing with this matter is found in Section 2 of Schedule "A" to the regulations which provides:

- "2. An independent applicant who intends to establish a business or to retire in Canada may be given a credit of twenty-five units instead of being assessed under the factors set out in paragraphs (c) and (d) of section 1 if
  - (a) he has sufficient financial resources to establish himself in business or to retire; and
  - (b) the immigration or visa officer is satisfied that any business the applicant proposes to establish has a reasonable chance of being successful."

- (a) he does, in fact, intend to establish a business in Canada;
- (b) he has sufficient financial resources to establish himself in business; and
- (c) he has the experience and ability necessary to give any business he might establish reasonable chance of success.

AND I make this solemn declaration conscientiously believing it to be true

AND knowing that it is of the same force and effect as if made under oath

AND by virtue of "THE CANADA EVIDENCE ACT".

DECLARED before me	
at the city of Vancouver	
in the province of British Columbia	
this third day of February 1969.	A.H. Wright, Immigration Officer
(Sgd.)	
J.H. Betteridge, Immigration Officer)	

L'article pertinent du Règlement sur l'immigration traitant de ce sujet est l'article 2 de l'Annexe "A" du Règlement qui stipule:

- "2. Le requérant indépendant qui a l'intention de s'établir à son propre compte, ou de vivre de ses rentes au Canada peut obtenir vingt-cinq points au lieu d'une appréciation fondée sur les facteurs énoncés aux alinéas (c) et (d) de l'article I.
- (a) si ses ressources financières sont suffisantes pour lui permettre de s'établir à son propre compte ou de vivre de ses rentes: et
- (b) si le fonctionnaire à l'immigration ou le préposé aux visas est persuadé que toute entreprise que le requérant projette d'établir a des chances raisonnables de succès."

Dans cet article l'appelant doit satisfaire aux exigences de deux critères, et la Commission remarque particulièrement les

There are two criteria in this section which must be met by the appellant and the Board particularly notes the wording of 2(b) "The Immigration or visa officer is satisfied". The Immigration officer interviewed and examined the appellant on two occasions, 19 September 1968 and 24 January 1969, and as a result of these interviews and examinations was not satisfied that he did in fact "intend to establish a business in Canada" "has sufficient financial resources to establish himself in business" and "has the experience and ability necessary to give any business he might establish a reasonable chance of success".

In Anastassios GIOULEKAS vs Minister of Manpower and Immigration, case number 68-5119 unreported, the writer in Reasons for Judgement, discussing the discretionary powers of an assessing officer and in particular the expression in the Regulations "In the opinion of an Immigration officer" stated as follows:

"The Board notes that the section reads "In the opinion of an Immigration officer". Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer, it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial review.

The crucial question here is, in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided. There are many matters which the Courts of Appeal are indisposed to question. Though they are the ultimate judges of what is lawful and is unlawful, they often accept the decision of the authority in which the discretion is confined simply because they are themselves ill equipped to weigh the merits of one solution, a practical question as against another.

In Dom. Trust Co. v. N.Y. Life Ins. Col, (1918) 3 W.W.R. 850, a statement of Lord Dunedin quoting Lord Halsbury in Montgomerie & Co. v. Wallace-James, (1904) A.C. 73, where Lord Halsbury stated:

'Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court.'

les termes de 2 (b) "le fonctionnaire à l'immigration ou le préposé aux visas "est persuadé." Le fonctionnaire à l'immigration a accordé deux entrevues à l'appelant et l'a examiné à ces occasions, respectivement le 19 septembre 1968 et le 24 janvier 1969; au terme de ces entrevues et examens le fonctionnaire à l'immigration n'était pas persuadé, car il n'a pas pu établir que l'appelant "a l'intention de s'établir à son compte au Canada", "dispose de ressources financières suffisantes pour lui permettre de s'établir à son propre compte", "a l'expérience et l'habilité nécessaire qui donneraient à toute entreprise projetée par le requérant des chances raisonnables de succès".

Dans la cause numéro 68-5119 (non-rapportée) Anastassios GIOULEKAS c. le Ministre de la Main-d'oeuvre et de l'Immigration, A.B. Weselak discute du pouvoir discrétionnaire d'un fonctionnaire chargé de l'appréciation et en particulier de l'expression extraite du Règlement "De l'avis d'un fonctionnaire de l'immigration", et a déclaré:

"The Board notes that the section reads "In the opinion of an Immigration officer". Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer, it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial review.

The crucial question here is, in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided. There are many matters which the Courts of Appeal are indisposed to question. Though they are the ultimate judges of what is lawful and is unlawful, they often accept the decision of the authority in which the discretion is confided simply because they are themselves ill equipped to weigh the merits of one solution, a practical question as against another."

Dans la cause opposant Dom. Trust Co. à N.Y. Life Ins. Co. (1918) 3 W.W.R. 850 Lord Dunedin cite Lord Halsbury qui, dans la cause Montgomerie & Co. c. Wallace-James, (1904) A.C. 73, a déclaré:

Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises a

And in Ruddy v. Toronto Eastern Ry., 38 O.L.R. 556, Lord

'Upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence - unless there is some good and special reason to throw doubt upon the soundness of his conclusions.'"

What is meant by the term "is satisfied" in Section 2(b) of Schedule "A"? Dictionaries and a survey of case law reveal that:

In the Shorter Oxford English Dictionary, Third Edition, the word satisfy is defined as:

"To answer sufficiently (an objection, question) to fulfil or comply with (a request) to solve a (doubt, difficulty) to furnish sufficient proof or information; to set free from doubt or uncertainty, to convince, to answer the requirements of a state of things (hypothesis) to accord with (conditions)."

In Roget's Dictionary of Synonyms the word satisfy is equated to:

"Convince, assure, persuade, suffice".

The word satisfy has been legally interpreted in the following cases: R. v. Solloway and Mills 65 O.L.R. 303 C.A. Vol. 13 at page 657 in which Riddell, J.A., states:

"It will be seen that sec. 629 provides that 'Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building...' may issue a search-warrant. This, literally interpreted, would mean that whenver a justice is in fact so satisfied, whether he should have been so satisfied or not, he may issue the warrant. But the issue of the warrant is the judicial act, and, as such, in the absence of statutory prohibition, its propriety may be examined by competent authority we are; and it is our duty to examine not into whether the justice was in fact satisfied but into whether he should have been satisfied. Independently of authority, I think that, while we must make all allowances for difference of opinion, honest mistakes, and all other circumstances, we must say that here there was not sufficient for the justice to base a 'satisfaction' upon. Not to mention the vagueness and generality of the statements in the information, the informant does not even pledge his oath to his own belief."

In Rex vs Anderson Vol. 5 W.W.R. at page 1054, a criminal appeal in which the defence was insanity, Harvey, C.J., had this to say:

to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.'

Et dans la cause Ruddy c. Toronto Eastern Ry., 38 O.L.R. 556, Lord Buckmaster a déclaré:

'Upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence - unless there is some good and special reason to throw doubt upon the soundness of his conclusions.'"

A l'article 2 (b) de l'Annexe "A" que veut dire l'expression "est persuadé"? L'examen des dictionnaires et du droit jurisprudentiel (case-law) a montré:
The Shorter Oxford English Dictionary, Third Edition, définit le mot "satisfy" ainsi:

"To answer sufficiently (an objection, question) to fulfil or comply with (a request) to solve a (doubt, difficulty) to furnish sufficient proof or information: to set free from doubt or uncertainty, to convince, to answer the requirements of a state of things (hypothesis) to accord with (conditions)."

Roget's Dictionary of Synonyms propose comme équivalent au mot "satisfy" les mots suivants:

"Convince, assure, persuade, suffice".

Le mot persuadé a reçu une interprétation juridique dans la cause suivante: R. c. Solloway et Mill 65 O.L.R. 303 C.A. Vol. 13 page 657 laquelle Riddell J.A. déclare:

"It will be seen that sec. 629 provides that 'Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building...' may issue a search-warrant. This, literally interpreted, would mean that whenever a justice is in fact so satisfied, whether he should have been so satisfied or not, he may issue the warrant. But the issue of the warrant is a judicial act, and, as such, in the absence of statutory prohibition, its propriety may be examined by competent authority we are; and it is our duty to examine not into whether the justice was in fact satisfied but into whether he should have been satisfied. Independently of authority, I think that, while we must make all allowances for difference of opinion, honest mistakes, and all other circumstances, we must say that here there was not sufficient for the justice to base a

"It is apparent that the only question to be determined is whether 'satisfying beyond a reasonable doubt' requires a higher degree of proof than 'proving to the satisfaction' or 'clearly proving'. With the meaning I attach to the word 'satisfy' I find myself unable to conceive how I can be satisfied that a thing is so if I have any reasonable doubt that it is so. The New Standard Dictionary defines 'satisfy' as meaning 'to free from uncertainty, doubt or anxiety; to set at rest the mind of'. Webster's International defines it in almost the same words: 'To free from doubt, suspense or uncertainty'."

In Re Hayward 1934 2 D.L.R. 210 at page 214, Kingstone, J., stated referring to "is satisfied":

"Nor is the power given to the Board under s. 8(1) of revoking certificates to any holder of a certificate who has been guilty of illegal practices, incompetency, inebriety, fraud or misrepresentation an attempt to give it jurisdiction in matters of criminal law. The powers conferred by the Legislature on this Board to not necessitate a criminal trial involving punishment for an alleged crime. It is merely the determination of facts upon which the civil rights of the accused may depend. It is a similar right to that conferred on the Benchers of the Law Society or the College of Physicians & Surgeons to inquire into the conduct of and discipline the members of those professions. The Legislature in my opinion is well within its rights in giving to this Board the right to say whether those persons practising optometry within Ontario are fit to practise their profession even though from another aspect the findings of the Board might as in the Stinson case determine that the accused were guilty of a crime."

### and at page 215:

"With some hesitation I have reached the decision that regulation 20 outlines the procedure in case of written complaint only and imposes on the Board an obligation to act when a written complaint has been filed but in no way prevents the Board if it sees fit to do so from acting on its own motion. If the Board 'is satisfied' should be interpreted to mean 'of the opinion' on such information as it may have received. The expression 'is satisfied' is not a happy one but I think it is reasonably clear on reading the whole section that what the draftsman really meant is that the Board on certain information coming to its notice could require the accused to appear before it. Not that it could deal with the charges in the absence of the accused but a procedure similar to that on an application for an interim injunction. It seems that the Legislature intended to give them the widest possible powers to act on their own initiative independently of any written

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"It is apparent that the only question to be determined is whether 'satisfying beyond a reasonable doubt' requires a higher degree of proof than 'proving to the satisfaction' or 'clearly proving'. With the meaning I attach to the word 'satisfy' I find myself unable to conceive how I can be satisfied that a thing is so if I have any reasonable doubt that it is so. The New Standard Dictionary defines 'satisfy' as meaning 'to free from uncertainty, doubt or anxiety; to set at rest the mind of'. Webster's International defines it in almost the same words: 'To free from doubt, suspense or uncertainty'."

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In Corpus Juris Secundum Vol. 78 at pages 582-3 "satisfy" is defined

"The term 'satisfy' is defined as meaning to free from anxiety, doubt, perplexity, suspense, or uncertainty; to free the mind from doubt and uncertainty; to give assurance to; to relieve from all uncertainty or doubt; to set at rest; to set at rest the mind of, on a given proposition; to convince."

On page 583 "satisfied":

"It has been said that 'satisfied' is a word of considerable expansiveness, and means a great many things, and is of too general and diffusive significance to be used as a substitute for the familiar phrase 'beyond a reasonable doubt'."

"'Satisfied' is also employed as meaning convinced; of the conviction; reasonably certain; relieved of all doubt or uncertainty; settled certainly, or fixed permanently what was before uncertain, doubtful, or disputed; and in this sense the term has been held equivalent to, or synonymous with, 'believe' see 10 C.J.S. p 239 note 95, and 'convinced beyond a reasonable doubt'."

In Black's Law Dictionary Deluxe Fourth Edition at page 1509 "satisfactory evidence" is defined as:

"Such evidence as is sufficient to produce a belief that the thing is true; credible evidence; such evidence as, in respect to its amount or weight, is adequate or sufficient to justify the court of jury in adopting the conclusion in support of which it is adduced. Walker v. Collins, C.C.A. Kan., 59 F. 74, 8 C.C.A. 1; U.S. v. Lee Huen, D.C.N.Y., 118 F 457. 'Satisfactory evidence', which is sometimes called 'sufficient evidence', means that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt."

Considering the above authorities the Board finds that Parliament has by apt words indicated that the exercise of any discretionary powers in determining whether he "is satisfied" lies with the Immigration officer. It finds that such officer must consider the evidence before him and form an opinion as to whether he is satisfied. It therefore applies the principles set out in the Gioulekas' case supra and finds that while it has power on appeal to review the Immigration officer's decision it will only, considering the evidence before it, interfere with the decision of the Immigration officer if it can be shown that the officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle.

The expression 'is satisfied' is not a happy one but I think it is reasonably clear on reading the whole section that what the draftsman really meant is that the Board on certain information coming to its notice could require the accused to appear before it. Not that it could deal with the charges in the absence of the accused but a procedure similar to that on an application for an interim injuction. It seems that the Legislature intended to give them the wides possible powers to to act on their own initiative independently of an written complaint being received."

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Considérant le poids des autorités ci-dessus mentionnées, la Commission déclare que le Parlement, en des mots appropriés, a fait savoir que l'exercice de tout pouvoir discrétionnaire par un in the instant case the Board is of the opinion that the officer had sufficient evidence before him to justify reaching the decision he did reach. The Board finds that such decision was not manifestly wrong and that the officer had not proceeded upon a wrong principle in reaching the decision.

Having disposed of this argument the Board finds that the appellant was assessed as an independent applicant and received forty-five units out of the required fifty units. The evidence does not disclose that this assessment was manifestly wrong or that the assessing officer had proceeded upon a wrong principle.

The Board therefore finds that the ground in the deportation order based upon Section 34(3)(f) of the Regulations is a valid ground.

The evidence reveals that the appellant is not a Canadian citizen nor has he acquired Canadian domicile. He admits he is not in possession of an immigrant visa and not in possession of a medical certificate in the prescribed form.

Having found the grounds in the order valid, the Board finds the deportation order to have been made in accordance with the Immigration Act and Regulations thereunder and therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

Section 15 of the Immigration Appeal Board Act provides as follows:

- "15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
  - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
    - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
    - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

fonctionnaire à l'immigration afin de déterminer "s'il est persuadé" incombe à ce dernier. Elle déclare que ce fonctionnaire doit considérer les preuves qui lui sont présentées et déterminer d'après cellesci s'il est persuadé ou non. En conséquence, elle applique les principes invoqués dans la cause Gioulekas mentionnée plus haut, et déclare que bien qu'elle ait en appel le pouvoir de réviser la décision du fonctionnaire à l'immigration elle ne fera que - considérant la preuve par devant elle - réviser la décision du fonctionnaire à l'immigration s'il peut être prouvé que le fonctionnaire est arrivé à une conclusion manifestement erronée ou s'il a agit au nom d'un principe mauvais.

Dans l'instance, la Commission estime que le fonctionnaire avait devant lui une preuve suffisante pour étayer sa décision et c'est ce qu'il a fait. La Commission déclare que cette décision n'était pas manifestement erronée et que le fonctionnaire n'a pas agit au nom d'un principe mauvais.

Ayant refuté cet argument, la Commission déclare que l'appelant a été apprécié en qualité de requérant indépendant et il a reçu quarante-cinq points sur les cinquante requis. La preuve ne montre pas que cette appréciation est manifestement erronée ou que le fonctionnaire a agit au nom d'un principe mauvais.

En conséquence, la Commission maintient la validité du motif qui a amené l'ordonnance d'expulsion selon l'article 34 (3) P du Règlement.

La preuve montre que l'appelant n'est pas un citoyen canadien et qu'il n'est pas une personne ayant acquis le domicile canadien. Il admet ne pas être en possession d'un visa d'immigrant et ne pas être en possession d'un certificat médical en la forme prescrite.

Les motifs amenant l'ordonnance ayant été trouvés valides, la Commission déclare que l'ordonnance d'expulsion a été établie conformément à la Loi sur l'immigration et par conséquent rejette l'appel conformément à l'article 14 de la Loi sur la Commission d'appel de l'immigration.

L'article 15 de la Loi sur la Commission d'appel de l'immigration stipule que:

- "15 (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que:
  - b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque ou a été rendue l'ordonnance d'expulsion, compte tenu

The Board on review of the evidence finds nothing to indicate the appellant will be punished for activities of a political nature.

Neither is there evidence of unusual hardship as the lant was steadily employed prior to his coming to Canada, he really close relatives here and has established no real roots this country.

As to the existence of humanitarian or compassionate considerations his wife and child are domiciled in Taiwan. It would not be an uprooting which would cause him great distress were he deported. His presence in Canada is not vital to any Canadian interest.

The Board therefore finds that there are insufficient grounds to warrant the granting of special relief in this case and directs that the deportation order be carried out as soon as practicable.

Dated at Ottawa, this 18th day of September 1969.

Concurred in by: J.C.A. Campbell, Vice-chairman and F. Glogowski.

For the appellant: T.W. Stewart, Barrister and Solicitor; For the respondent: E. Sojonky, Barrister and Solicitor.

- i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
- ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

La Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue, le droit d'entrée ou de débarquement".

Après avoir examiné la preuve, la Commission déclare que rien n'indique que l'appelant sera puni pour des activités d'un caractère politique.

Non plus, il n'y a pas de preuve indiquant qu'il sera soumis à de graves tribulations puisque l'appelant avait un emploi stable avant sa venue au Canada, il n'a pas de proches parents ici et n'a pas noué de liens dans ce pays.

Au sujet de l'existence de motifs de pitié, ou de considérations d'ordre humanitaire, sa femme et son fils sont domiciliés à Taiwan. S'il était expulsé le déracinement ne lui causerait pas grande peine. Sa présence au Canada n'est pas d'une importance capitale pour les intérêts canadiens.

Par conséquent, la Commission déclare qu'il n'y a pas de motifs suffisants justifiant l'octroi d'un redressement spécial de cette cause et ordonne que l'ordonnance d'expulsion soit exécutée le plus tôt possible.

Ottawa le 18 septembre 1969.

Ont souscrit: J.C.A. Campbell et F. Glogowski.

Pour l'appelant: Me T.W. Stewart; Pour l'intimé: Me E. Sojonky. 10 Wal Hung .

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 11, 1969. File: 68-6186.

Coram: Jean-Pierre Houle, F. Glogowski, J.A. Byrne.

Section 23 Report - sufficiency of contents. - Immigration Act: 5(t), 23; Immigration Regulations: 34(3)(f); Immigration Inquiries Regulations: 5.

Held: In general, in the opinion of the Board, it is sufficient to set out in the section 23 Report the individual sections enunciated in the Act if the section conveys to the person concerned the allegations with sufficient clarity. But where, as in section 5(t) of the Immigration Act, several such possible allegations exist, the principles of natural justice and the Bill of Rights impose upon the Immigration Officer the obligation of setting out more precisely which one of these allegations is invoked against the person concerned, and that is what section 5 of the Immigration Inquiries Regulations appears to insure. However, the sufficiency of section 23 Report must be examined in each case in relation to the facts of the case to determine its validity.

Houle, dissenting: Essentially it is about the scope and implications of section 23 of the Immigration Act and section 5 of the Regulations respecting the conduct of Immigration Inquiries that I differ in opinion with my colleagues.

The section 23 Report is filed as an exhibit and read to the person concerned for he must know why he is called before the Special Inquiry Officer: in that sense the report is the causa causans of the inquiry; it activates the inquiry but in se and per se the Section 23 Report does not determine the fate of a person who has been the subject of an examination. The inquiry is held to determine that fate and the decision to make an order of deportation is then made. The Board determines whether the inquiry has been full, complete and proper and pronounces upon the validity and legality of the order. An appeal therefore lies to the Board from an order of deportation made by a Special Inquiry Officer and not from a report or an expression of opinion by an Immigration officer.

The section 23 Report is merely "une pièce introductive d'instance"; the power and authority to hold an inquiry is vested in

4. HO Wai Hung,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 11 septembre 1969; Dossier: 69-278.

Coram: Jean-Pierre Houle, F. Glogowski, J.A. Byrne.

Rapport prévu par l'article 23 - suffisance du contenu. - Loi sur l'immigration: 5(t), 23; Règlement sur l'immigration: 34(3)(f); Règlement sur les enquêtes de l'immigration: 5.

Arrêt: En général, la Commission estime qu'il est suffisant d'indiquer, dans le rapport prévu à l'article 23, les articles particuliers prévus dans la Loi si l'article révèle, avec une clarté suffisante, les allégations à la personne intéressée. Mais lorsque plusieurs allégations possibles existent, comme dans l'article 5(t) de la Loi sur l'immigration, les principes de justice naturelle ainsi que la Déclaration des droits imposent au fonctionnaire à l'immigration l'obligation de définir plus précisement laquelle de ces allégations est invoquée contre la personne intéressée et il semble que ce soit ce que l'article 5 du Règlement sur les enquêtes de l'immigration paraît assurer. La Commission désire préciser ceci: le bien-fondé du rapport prévu par l'article 23 doit être examiné dans chaque cause et ceci en relation avec les faits de la cause, afin de décider de sa validité.

Houle - dissident: Je ne partage pas l'opinion de mes collègues principalement au sujet de la portée et des implications de l'article 23 de la Loi sur l'immigration et de l'article 5 du Règlement concernant la tenue des enquêtes de l'immigration.

Le rapport prévu par l'article 23 est une pièce à l'appui; il est lu à la personne intéressée afin qu'elle sache pourquoi elle a été appelée devant l'enquêteur spécial: dans ce sens le rapport est la causa causans de l'enquête, il la déclenche mais in se et per se le rapport prévu par l'article 23 ne décide pas du sort de la personne examinée. Le sort et la décision de rendre une ordonnance d'expulsion sont établis à l'enquête car tels sont les buts de celleci; la Commission, elle, déterminera si l'enquête a été satisfaisante, complète et régulière et elle se prononcera sur la validité ou la légalité de l'ordonnance d'expulsion. Un appel devant la Commission suit une ordonnance d'expulsion rendue par un enquêteur spécial et non un rapport ou l'expression de l'opinion d'un fonctionnaire à l'immigration.

Special Inquiry Officer by virtue of section 11(2)(3) of the Immigration Act and not by an expression of opinion stated in an administrative report.

The majority judgment of the Board was delivered by:

### F. Glogowski:

This is an appeal from a deportation order made at Vancouver, British Columbia, on 6th February, 1969, by Special Inquiry Officer L.R. McGrath, in respect of the appellant, Ho Wai Hung, in the following terms:

- "i) You are not a Canadian citizen,
- ii) You are not a person having Canadian domicile,
- iii) You are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or the Regulations by reason of:
  - (a) Paragraph (b) of subsection (4) of section 34 of the Immigration Regulations, Part I in that in the employer of the Immigration Officer you would not on application be issued an immigrant visa or letter of pre-examination if outside Canada.
  - (b) You are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of section 28 of the Immigration Regulations, Part I.
  - (c) Your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I."

The appeal was heard on the 24th June, 1969. The appellant was rot present at the hearing of his appeal but was represented by his counsel, Dr. D.P. Pandia, Barrister. The Respondent was represented by Mr. F.D. Craddock.

The facts of this case are as follows: Mr. Ho Wai Hung is a fifty-two year old married citizen of China whose wife and five children reside in Mainland China. The oldest son resides in Hong Kong. The appellant's father, a Canadian citizen, was born in China but came to Canada at the age of sixteen. The appellant's mother, a Canadian citizen, was born in the Ukraine. Mr. Ho was born in

Le rapport prévu par l'article 23 est simplement "une pièce introductive d'instance"; l'enquêteur spécial est investi du pouvoir et de l'autorité de tenir une enquête en vertu de l'article ll(2)(3) de la Loi sur l'immigration et non par l'expression d'une opinion déclarée dans un rapport administratif.

Le jugement majoritaire de la Cour fut rendu par:

### F. Glogowski:

Appel d'une ordonnance d'expulsion rendue à Vancouver, Colombie britannique, le 6 février 1969, par l'enquêteur spécial L.R. McGrath, contre l'appelant Ho Wai Hung.

L'ordonnance d'expulsion dit:

- "i) You are not a Canadian citizen,
- ii) You are not a person having Canadian domicile,
- iii) You are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or the Regulations by reason of:
  - (a) Paragraph (b) of subsection (4) of section 34 of the Immigration Regulations, Part I in that in the opinion of the Immigration officer you would not on application be issued an immigrant visa or letter of pre-examination if outside Canada.
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  - (c) Your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I."

L'appel a été entendu le 24 juin 1969; l'appelant n'était pas à l'audition de son appel mais il était représenté par son conseiller juridique Dr. D.P. Pandia. M. F.D. Craddock occupait pour l'intimé.

Les faits pertinents à cette cause sont les suivants: M. Ho Wai Hung est un citoyen de Chine, âgé de cinquante-deux ans. his parents went to live in that country in 1915.

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The appellant left school at the age of sixteen and later worked as a carpenter and a farmer. He left Mainland China in 1954 and since that time lived in Hong Kong where he had been employed as a machine operator and then had his own plastic business, which he still owns.

The Minutes of the Inquiry indicate (see pages 20, 21 and 25) that the appellant's parents endeavoured to bring him to Canada soon after their own return to this country in 1954, as they made an application for his admission to Canada in 1955. Apparently they were not successful in this endeavour under the Regulations then in effect concerning persons residing at that time in Hong Kong.

The appellant came to Canada as a visitor on the 27th October, 1967. Since coming to Canada he has been in the hospital for the removal of a kidney. Dr. Harry H. Pitts, a Urologist, in his letter dated the 23rd June, 1969, which was received by the Board on the date of the hearing of this appeal, describes the appellant's state of health as follows:

"This patient had his left kidney removed in November, 1967, for chronic infection with a large staghorn stone. This condition possibly developed and continued unattended because of suboptimal medical care in the Orient.

Kidney stones can well be a recurrent proposition and this patient requires interval assessment to be sure that his remaining kidney continues to be free of stones.

In the patient's best interests therefore I would strongly advise his being allowed to remain in this country."

A Nominated Relative Application was made on the appellant's behalf by his sister, Mrs. Betty Wong of Vancouver, a Canadian citizen, on the 17th January, 1968. Subsequently, the appellant was examined by Immigration Officer A.L. Southam, who made a Report under Section 23 of the Immigration Act dated the 15th October, 1968, which reads as follows:

# "HO Wai Hung - Report under Section 23 of the Immigration Act

1. Ho Wai Hung entered Canada as a non-immigrant at Vancouver International Airport on 27 October, 1967, as a visitor for a period to expire, with extensions, on 31 March, 1968. He has now reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act and, as a Nominated Relative, is seeking admission to Canada for permanent residence.

Il est marié et père de cinq enfants; sa femme et les enfants demeurent en Chine continentale, mais l'aîné des fils vit à Hong King. Le père de l'appelant est un citoyen canadien né en Chine, mais venu au Canada à l'âge de seize ans. La mère de l'appelant est une citoyenne canadienne née en Ukraine. M. Ho. est né en Chine, très peu de temps après l'arrivée de ses parents dans ce pays en 1915. Les parents de l'appelant, ainsi que ses deux frères canadiens, William et Joseph, et une soeur Betty qui est aussi née en Chine, résident à Vancouver en Colombie britannique.

L'appelant après avoir quitté l'école à l'âge de seize ans a travaillé en tant que charpentier et fermier. Il a quitté la Chine continentale en 1954 pour vivre à Hong Kong, où il a été employé comme machiniste, ensuite il s'est établi à son compte dans le commerce des matières plastiques. Il possède encore ce commerce.

Le procès-verbal de l'enquête indique (voir pages 21 et 25) que les parents de l'appelant ont essayé de le faire venir au Canada peu de temps après leur retour dans ce pays en 1955. Apparemment, ils n'ont pas réussi dans leur entreprise à cause des dispositions du Règlement, qui alors visaient les personnes résidant à Hong Kong.

Le 27 octobre 1967, l'appelant est venu au Canada en tant que visiteur. Depuis son arrivée au Canada, il est resté dans un hôpital pour subir l'ablation d'un rein. Dr. Harry H. Pitts, un urologue, dans sa lettre datée du 23 juin 1969, lettre reçue par la Commission à la date de l'audition de l'appel, décrit ainsi l'état de santé de l'appelant:

" This patient had his left kidney removed in November, 1967, for chronic infection with a large staghorn stone. This condition possibly developed and continued unattended because of suboptimal medical care in the Orient.

Kidney stones can well be a recurrent proposition and this patient requires interval assessment to be sure that his remaining kidney continues to be free of stones.

In the patient's best interest therefore I would strongly advise his being allowed to remain in this country."

Le 17 janvier 1968 "une demande par parents désignés" a été faite pour l'appelant par sa soeur, Mme Betty Wong de Vancouver, une citoyenne canadienne. Subséquemment, l'appelant a été examiné par le fonctionnaire à l'immigration A.L. Southam, qui a fait un rapport prévu par l'article 23 de la Loi sur l'immigration. Le rapport daté du 15 octobre 1968 dit:

- 2. Pursuant to Section 23 of the Immigration Act I have to report that I have examined Ho Wai Hung and, in my opinion, he is not a Canadian citizen or a person who has acquired Canadian domicile.
- 3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant him admission to Canada for permanent residence because he is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that he does not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of:
  - (a) paragraph (b) of subsection (4) of Section 34 of the Immigration Regulations, Part I, in that, in my opinion, he would not, on application, be issued an immigrant visa or letter of pre-examination if outside Canada.
  - (b) he is not in possession of a valid and subsisting Immigrant Visa issued to him by a Visa Officer as required by subsection (1) of Section 28 of the Immigration Regulations, Part I.
  - (c) his passport does not bear a medical certificate duly signed by a medical officer nor is he in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I.

Signed A.L. Southam."

On the 6th February, 1969, Mr. Ho was ordered deported by the deportation order quoted above. Dr. Pandia, the appellant's counsel, argued very forcibly that this Order of Deportation was illegal. He raised the following issues in this appeal.

The Section 23 Report is not valid and has no legal effect because it is not in strict compliance with the Regulations. On that issue Dr. Pandia argued that under the Immigration Inquiries Regulations the Section 23 Report should state the exact Act or newers on of the Act or the Regulations which is the basis for the Report.

Apparently Counsel referred to Section 5 of the Regulations Respecting the Conduct of Immigration Inquiries, which reads as follows:

"5. Where an Immigration officer has caused a person seeking to come into Canada to be detained and has reported him to a Special Inquiry Officer pursuant to section 23 of the Act, the report so made shall be in writing and shall set out the provisions of the

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Signed A.L. Southam."

Le 6 février 1969 par l'ordonnance d'expulsion citée plus haut, M. Ho était sommé de quitter se Canada. Dr. Pandia, le conseiller de l'appelant, a soutenu avec force que l'ordonnance d'expulsion était illégale. Il a soulevé les litiges suivants dans cet appel.

Le rapport prévu par l'article 23 n'est pas valide et n'a pas d'effet légal, car il n'est pas en stricte conformité avec le Règlement. Sur ce point Dr. Pandia a soutenu que, selon le Règlement sur les enquêtes de l'immigration, le rapport prévu par l'article 23 devrait indiquer la Loi exacte ou la disposition de la Loi ou le Règlement qui le fonde.

Act or the Immigration Regulations by reason of which the Immigration officer is of the opinion that the person should not be granted admission or allowed to come into Canada."

The next issue raised by Dr. Pandia refers to the admissibility of the appellant's immediate family. On that point he argued that "the law must provide equal opportunity for every immigrant from every part of the world" and "that is the basis of the new Regulations. But if something happens beyond which he has no control and his family could not get out . . . so, it is not his fault". Dr. Pandia argued, therefore, "that it should not be held against his client that his immediate family cannot make themselves available for examinations as it is well known that the Chinese Government will not allow anybody to examine their Nationals". He based this argument on the assumption that the law postulates the possible not the impossible. That is to say "the law itself does not contemplate something which is impossible". Finally, Dr. Pandia pointed out that the question of examination of the members of the appellant's immediate family is not of paramount nature, as they would be sponsored immigrants if Mr. Ho was granted landing and they would not need to be assessed under the points system.

The first question to be resolved by the Board is whether Immigration officer A.L. Southam set out in his Report dated the 15th October, 1968, the provisions of the Immigration Act and Regulations by reason of which he was of the opinion that the person concerned should not be granted admission or allowed to come into Canada.

Let us examine carefully the Section 23 Report made by Immigration officer Southam, especially paragraph 3(a) which, in Dr. Pandia 's opinion, is the main basis for the Report. In the paragraph mentioned, Mr. Southam states as follows:

- "3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant him admission to Canada for permanent residence because he is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that he does not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of:
  - (a) paragraph (b) of subsection (4) of Section 34 of the Immigration Regulations, Part I, in that, in my opinion, he would not, on application, be issued an immigrant visa or letter of pre-examination if outside Canada."

On the face of the above quoted paragraph it would appear that Immigration officer Southam set out the provision of the Immigration Act and Regulations and by invoking Section 5(t) of the Immigration Act combined with Section 34(4)(b) of the Immigration Regulations, Part I, he formulated certain allegations sufficient

Apparemment le conseiller a mentionné l'article 5 du Réglement concernant la tenue des enquêtes de l'immigration qui dit:

"5. Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada ni autorisée à y venir."

Le deuxième point soulevé par Dr. Pandia a trait à l'admissibilité des parents immédiats de l'appelant. Sur ce point, il a soutenu que "the law must provide equal opportunity for every immigrant from every part of the world" et "that is the basis of the new Regulations. But if something happens beyond which he has no control and his family could not get out . . . so, it is not his fault". Dr. Pandia a donc maintenu "that it should not be held against his client that his immediate family cannot make themselves available for examinations as it is well known that the Chinese Government will not allow anybody to examine their Nationals". Il a fondé son argumentation sur l'hypothèse suivante; la loi demande le possible et non l'impossible. Ce qui veut dire "the law itself does not contemplate something which is impossible". Finalement, Dr. Pandia a fait remarquer que la question de l'examen des membre de la famille immédiate de l'appelant n'est pas de nature essentielle: car ils seraient des immigrants parainnés si on avait accordé à M. Ho le droit de débarquement et ils n'auraient pas besoin d'être appréciés selon le système de points.

La première question à résoudre par la Commission est celleci: le fonctionnaire à l'immigration A.L. Southam dans son rapport daté du 15 octobre 1968, a-t-il défini ou non les dispositions de la Loi sur l'immigration et du Règlement en raison des quelles il a estimé que la personne intéressée ne doit pas être admise au Canada n'y autorisée à y venir?

Examinons soigneusement le rapport prévu par l'article 23 émis par le fonctionnaire à l'immigration Southam, et en particulier l'alinéa 3 (a) sur lequel, selon Dr. Pandia, repose tout le rapport. À l'alinéa mentionné, M. Southam déclare ceci:

"3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant him admission to Canada for permanent residence because he is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that he does not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of:

for making a Report as required by him by Section 23 of the Immigration Act. This view might be supported to some extent by the Judgment given by the Supreme Court of Canada in Vaaro v. R. (1933) S.C.R. 36. In this Judgment Mr. Justice Lamont said, at page 46: "All that is necessary, in the complaint, in my opinion, is that the allegation shall make known with reasonable certainty to the person against whom the investigation is directed, the conduct on his part, in violation of the Act, to which objection is taken." Further on this same page Mr. Justice Lamont stated: "The object of making provisions for a Board of Inquiry is to have at hand a tribunal which can without delay, inquire into the truth of the allegations made in the complaint".

In view of the above quoted Judgment of Mr. Justice Lamont, it is worthwhile to ponder whether Section 5(t) of the Immigration Act combined with Section 34(4)(b) of the Immigration Regulations, Part I, invoked by Immigration officer Southam in his Section 23 Report "made known with reasonable certainty to the person against whom the investigation was directed, the conduct on his part, in violation of the Act. ..".

It is apparent from Dr. Pandia's submission in this matter that he is of the opinion "that there is nothing in the Report to show that the appellant will not be issued an immigrant visa or letter of pre-examination if outside Canada". In other words, that the Immigration officer failed to deal with the particular issue in this case and did not set out the proper provisions of the Act or the Immigration Regulations by reason of which he was of the opinion that the person concerned should not be granted admission or allowed to come into Canada. In support of his argument Dr. Pandia referred to Samejima v. R. (1932) S.C.R. 640. This Judgment by the Supreme Court of Canada sets the principle that the facts must be alleged in such a manner that the person concerned will have a reasonable opportunity of knowing the nature of the allegations.

The question before the Board, therefore, is to decide whether Section 5(t) of the Immigration Act combined with Section 34(4)(b) invoked by Immigration officer Southam in his Section 23 Report gave the appellant a reasonable opportunity of knowing the nature of the allegation.

Section 34(4)(b) of the Immigration Regulations, Part I, reads:

"Notwithstanding Section 28, an applicant in Canada who is not in possession of an immigrant visa or letter of pre-examination but, in the opinion of an Immigration officer, would on application be issued a visa or a letter of pre-examination if outside Canada may be admitted to Canada for permanent residence if ..."

(a) paragraph (b) of subsection (4) of Section 34 of the Immigration Regulations, Part I, in that, in my opinion he would not, on application, be issued an immigrant visa or letter of pre-examination if outside Canada."

Selon l'alinéa, ci-dessus cité il semble que le fonctionnaire à l'immigration Southam ait défini les dispositions de la Loi sur l'immigration et du Règlement; de plus ce fonctionnaire en invoquant l'article 5(t) de la Loi sur l'immigration joint à l'article 34(4)(b) du Règlement sur l'immigration Partie I, a formulé certaines allégations suffisantes pour rédiger un rapport comme le lui demande l'article 23 de la Loi sur l'immigration. Ce point, dans une certaine mesure, peut être soutenu par le jugement rendu par la Cour Suprême du Canada dans la cause Vaaro c. R. (1933) R.C.S. 36. Dans ce jugement, à la page 49, M. Justice Lamont a dit: "The object of making provisions for a Board of Inquiry is to have at hand a tribunal which can without delay, inquire into the truth of the allegations made in the complaint".

En raison du jugement, ci-dessus cité, rendu par M. Justice Lamont, il est important de considérer si l'article 5(t) de la Loi sur l'immigration joint à l'article 34(4)(b) du Règlement sur l'immigration Partie I, invoqués par le fonctionnaire à l'immigration Southam, dans son rapport selon l'article 23, "made known with reasonable certainty to the person against whom the investigation was directed, the conduct on his part, in violation of the Act. . ".

D'après les arguments présentés par Dr. Pandia, il est clair, qu'il estime "that there is nothing in the Report to show that the appelant will not be issued an immigrant visa or letter of preexamination if outside Canada". En d'autres termes, le fonctionnaire à l'immigration a omis de traiter les litiges particuliers de cette cause et n'a pas défini les dispositions régulières de la Loi ou du Règlement sur l'immigration en raison desquelles il a estimé que la personne intéressée ne doit pas être admise au Canada ni autorisée à y venir. A l'appui de son argument Dr. Pandia a cité la cause Samejima c. R. (1932) R.C.S. 640. Ce jugement rendu par la Cour Suprême du Canada définit le principe suivant: les faits doivent être allégués de telle façon que la personne intéressée aura une chance équitable de connaître la nature de l'allégation. En conséquence, pour la Commission il s'agit de décider de la question suivante: l'article 5(t) de la Loi sur l'immigration joint à l'article 34(4)(b) invoqués par le fonctionnaire à l'immigration Southam dans son rapport de l'article 23 donnent-ils ou ne donnent-ils pas à l'appelant une chance équitable de connaître la nature de l'allégation.

L'article 34(4)(b) du Règlement sur l'immigration, Partie I, dit:

"Nonobstant les dispositions de l'article 28 un requérant se trouvant au Canada qui n'est pas en possession d'un visa d'immigrant ou d'une lettre de pré-examen, mais à qui, de l'avis d'un (then the other conditions follow under paragraphs (c), (d), (e), (f) and (g).

Immigration officer Southam paraphrased this Section in his Section 23 Report as follows:

"...he does not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I by reason of paragraph (b) of subsection (4) of Section 34 of the Immigration Regulations, Part I, in that, in my opinion, he would not, on application, be issued an immigrant visa or letter of pre-examination if outside Canada."

From the Minutes of the Inquiry it appears that the Special Inquiry Officer was not satisfied that the allegations were defined in such a manner that the appellant had a reasonable opportunity of knowing the nature of the allegations and therefore, he, himself, spelled out the factual and proper reasons for making the Section 23 Report. This evidence reads as follows:

 $^{\prime\prime}Q_{\cdot}$  . Do you understanding the meaning of that regulation? A. Yes.

Therefore, Mr. Ho if you were outside Canada and you admission to Canada was nominated, you would have fallen within the provisions of subsection (2) of section 33 of the Immigration Regulations, paragraphs (a) and (b) which read as follows:

- "A nominated relative and his immediate family may be granted admission to Canada for permanent residence if
- (a) he and his immediate family comply with the requirements of the Act and these Regulations; and
- (b) the person nominating him has met the requirements of subsection (4) and an order of deportation has not been made against that person."
- "Q. Have any of the other members of your family that is your wife and any of your children been examined by a Canadian Immigration officer at any time?
- A. No.
- Q. Outside of your one child who is in Hong Kong, are the other members of the family able to get to Hong Kong?
- A. I don't think so until Canada recognizes Communist China maybe there will be a possibility.
- Q. Do you understand then that under the terms of our Regulations Mr. Ho, that when you are nominated for admission to Canada that all member of your immediate

fonctionnaire à l'immigration, serait délivré sur demande un visa ou une lettre de pré-examen s'il se trouvait hors du Canada peut être admis en vue d'y résider en permanence (ensuite les autres conditions sont prescrites aux paragraphes (c), (d), (e), (f) and (g).

L'officer à l'immigration Southam a paraphrasé cet article dans l'article 23 de son rapport qui dit:

"...he does not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I by reason of paragraph (b) of subsection (4) of Section 34 of the Immigration Regulations, Part I, in that, in my opinion, he would not, on application, be issued an immigrant visa or letter of pre-examination if outside Canada."

D'après le procès-verbal de l'enquête il apparaît que l'enquêteur spécial n'était pas convaincu que la façon dont avait été définies les allégaltions donnait à l'appelant une chance équitable de connaître la nature des allégations, il a donc lui-même clarifié les raisons déterminantes à l'origine du rapport prévu par l'article 23. Cette preuve dit:

 $^{\prime\prime}Q_{\star}$  . Do you understand the meaning of that regulation? A. Yes.

Therefore, Mr. Ho if you were outside Canada and your admission to Canada was nominated, you would have fallen within the provisions of subsection (2) of section 33 of the Immigration Regulations, paragraphs (a) and (b) which read as follows:

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- "Q. Have any of the other members of your family that is your wife and any of your children been examined by a Canadian Immigration officer at any time?
- A. No.
- Q. Outside of your one child who is in Hong Kong, are the other members of the family able to get to Hong Kong?
- A. I don't think so until Canada recognizes Communist China maybe there will be a possibility.

family including yourself must qualify for admission to Canada and must therefore be examined by a Canadian Immigration officer?

A. Yes, but I have to get in the minor child, only one."

In view of the above statements by Special Inquiry Officer McGrath, one ponders why in the first place Immigration Officer Woutham did not invoke the peoper provisions, namely Section 33(2) (a) and (b) of the Immigration Regulations, Part I.

The Board has heard and decided several appeals from Orders of Deportation based on the ground that the appellant and his immediate family could not comply with the requirements of the Immigration Act and Regulations. However, in these appeals the record comprised Section 23 Reports which clearly indicated the factual and real reasons why the person concerned did not comply with the requirements of the Immigration Act and Regulations. In these cases "the provisions of the Immigration Act or Regulations by reason of which the Immigration officer was of the opinion that the person should not be granted admission or allowed to come into Canada" were set out in the Section 23 Report in such a way that the person concerned had a reasonable opportunity of knowing the nature of the allegations with which he was confronted at the Inquiry caused by the Section 23 Report.

In the appeal of Joyce Lewis, (file 68-5937) the Board dealt with a similar situation. In that case, Exhibit "A" to the Minutes of the Inquiry, i.e. the Section 23 Report signed by Immigration officer A. Nebasio, reads as follows:

- I am also of the opinion that it would be contrary of the Immigration Act and Regulations to grant her admission to Canada for permanent residence because she is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that she does not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
- (a) paragraph (b) of subsection 3 of Section 34 of the Immigration Regulations, Part I, amended, in that she would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside Canada, she would have been refused admission pursuant to paragraph (a) of subsection 1 of Section 32 of the Immigration Regulations, Part I, amended, because the head of the family of which she is a member does not comply with the requirements of these Regulations. That is, her husband Joseph Lewis, an independent applicant, residing in Kingston, Jamaica, has been assessed in accordance with the Norms for Assessment of Independent Applicants set out in Schedule 'A' of the

- Q. Do you understand then that under the terms of our Regulations Mr. Ho, that when you are nominated for admission to Canada that all members of your immediate family including yourself must qualify for admission to Canada and must therefore be examined by a Canadian Immigration Officer?
- A. Yes but I have to get in the minor child, only one."

En raison des déclarations faites ci-dessus par l'enquêteur spécial McGrath on se demande, en premier lieu, pourquoi le fonctionnaire à l'immigration Southam n'a pas invoqué les dispositions appropriées, à savoir l'article 33(2)(a) et (b) du Règlement sur l'immigration, Partie I.

La Commission a entendu et jugé de plusieurs appels d'ordonnances d'expulsion basées sur la preuve que l'appelant et sa famille immédiate ne pouvaient satisfairent aux exigences de la Loi sur l'immigration et le Règlement. Toutefois, dans ces appels le dossier comprenait des rapports prévu par l'article 23 qui indiquaient clairement les raisons réelles et déterminantes démontrant pourquoi la personne intéressée ne satisfaisait pas aux exigences de la Loi sur l'immigration et du Règlement. Dans ces causes "les dispositions de la Loi sur l'immigration ou du Règlement par suite desquels le fonctionnaire à l'immigration a estimé que la personne ne doit pas être admise au Canada ni autorisée à y entrer" étaient définies dans le rapport prévu par l'article 23 de telle façon que la personne intéressée avait une chance équitable de connaître la nature des allégations avec lesquelles elle était confrontée à l'enquête amenée par le rapport prévu par l'article 23.

Dans l'appel de Joyce Mable Lewis, (dossier no. 68-5937) la Commission a statué dans une affaire analogue. Dans cette cause, la pièce à l'appui "A" au procès-verbal de l'enquêteur spécial A. Nebasio, déclare:

- "3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant her admission to Canada for permanent residence because she is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that she does not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) paragraph (b) of subsection 3 of Section 34 of the Immigration Regulations, Part I, amended, in that she would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside Canada, she would have been refused admission pursuant to paragraph (a) of subsection 1 of Section 32 of the Immigration Regulations, Part I, amended, because

Immigration Regulations, Part I, amended, and has not achieved the units of assessment required by independent applicants outside Canada, pursuant to paragraph (3) of Schedule 'A' of the Immigration Regulations, Part I, amended:"

In the other similar appeal, namely Terese Jesus Rebelo De Sousa, (file 68-6096) which was heard by the Board on the 15th April, 1969, the respective paragraph of the Section 23 Report made by Immigration officer F.J. Stefan reads as follows:

- I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant her admission to Canada for permanent residence because she is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigra-Act in that she does not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
- (a) paragraph (b) of subsection 3 of Section 34 of the Immigration Regulations in that she would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside of Canada, she would have been refused admission pursuant to paragraph (a) of subsection 1 of Section 32 of the Immigration Regulations because the head of the family of which she is a member does not comply with the requirements of these Regulations. That is, her husband Francisco Maria Sousa, an independent applicant, residing in Azores, Portugal, has been assessed in accordance with the Norms for Assessment of Independant Applicants set out in Schedule 'A' of the Immigration Regulations and has not achieved the units of assessment required by indenpendent applicants outside Canada, pursuant to paragraph (3) of Schedule 'A' of the Immigration Regulations:"

It is evident from the above quoted excerpts of the Section 23 Reports made by Immigration officers Nebasio and Stefan that they clearly defined and set out the provisions of the Immigration Act and Regulations, Part I, by reason by reason of which they were of the opinion that the persons concerned should not be granted admission or allowed to come into Canada.

Section 22 of the Immigration Appeal Board Act states that this Board "has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an Order of Deportation". The Board, therefore, is obliged to determine in this appeal whether Immigration officer A.L. Southam's Report under Section 23 was made in accordance with the law.

In general, in the opinion of the Board, it is sufficient to set out in the Section 23 Report the individual sections enunciated in the Act if the Section conveys to the person concerned the  $\frac{1}{2}$ 

the head of the family of which she is a member does not comply with the requirements of these Regulations. That is, her husband Joseph Lewis, an independent applicant, residing in Kingston, Jamaica, has been assessed in accordance with the Norms for Assessment of Independent Applicants set out in Schedule 'A' of the Immigration Regulations, Part I, amended, and has not achieved the units of assessment required by independent applicants outside Canada, pursuant to paragraph (3) of Schedule 'A' of the Immigration Regulations, Part I, amended:"

Dans un autre appel semblable, nommément Terese Jesus Rebelo de Sousa (dossier no. 68-6096) qui a été entendu par la Commission le 15 avril 1969, l'alinéa pertinent du rapport prévu par l'article 23 fourni par le fonctionnaire à l'immigration F.J. Stefan déclare:

- "3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant her admission to Canada for pernament residence because she is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that she does not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) paragraph (b) of subsection 3 of Section 34 of the Immigration Regulations in that she would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside of Canada, she would have been refused admission pursuant to paragraph (a) of subsection 1 of Section 32 of the Immigration Regulations because the head of the family of which she is a member does not comply with the requirements of these Regulations. That is, her husband Francisco Maria Sousa, an independent applicant, residing in Azores, Portugal, has been assessed in accordance with the Norms for Assessment of Independent Applicants set out in Schedule 'A' of the Immigration Regulations and has not achieved the units of assessment required by independent applicants outside Canada, pursuant to paragraph (3) of Schedule 'A' of the Immigration Regulations;"

Selon les extraits de rapport prévu à l'article 23, cités cidessus, rapports émis par les fonctionnaires à l'immigration Nebasio et Stefan, il est évident que ces fonctionnaires ont clairement défini et précisé les dispositions de la Loi sur l'immigration et du Règlement, Partie I, en raisons desquelles ils ont estimé que les personnes intéressées ne devaient pas être admises au Canada ni être autorisées à y venir.

allegations with sufficient clarity. But where, as in Section 5(t) of the Immigration Act, several such possible allegations exists, the principles of natural justice and the Bill of Rights impose upon the Immigration officer the obligations of setting out more precisely which one of these allegations is invoked against the person concerned, and it appears that that is what Section 5 of the Immigration Inquiries Regulations appear to insure.

However, the Board wishes to make it clear that the sufficiency of the Section 23 Report must be examined in each case in relation to the facts of the case to determine its validity.

In this particular case it is evident that Immigration officer Southam, in making the Section 23 Report, failed to define his allegations in such a manner, so that neither the Special Inquiry Officer who received this Report initiating the Inquiry nor the person concerned, when faced at the Inquiry with this Report, were aware of the nature of the allegation upon which Immigration officer Southam formed the opinion that Mr. Ho was a person not admissible to Canada. This particular Report, in the opinion of the Board, is not only ambiguous and vague in its allegations, but lacks the necessary substance to be considered as one made in accordance with the requirements of Section 5 of the Immigration Inquiries Regulations.

In view of what was said above, the Board finds that in this particular appeal the said Report failed to comply with the requirements of the Immigration Inquiries Regulations. As the Section 23 Report was not made in accordance with the law it is a nullity. Subsequently, all the Inquiry proceedings held as a result of the said Section 23 Report are also a nullity.

In view of this conclusion it is unnecessary to consider the other grounds of appeal submitted by the appellant's counsel, Dr. Pandia.

The appeal is allowed.

Dated at Ottawa this 9th day of December, 1969.

Concurred in by: J.A. Byrne.

Dissenting: Jean-Pierre Houle:

With the greatest respect I would not dispose of the appeal in the manner proposed by my learned colleagues, that is that ... "As the Section 23 Report was not made in accordance with the law, it is a nullity and all the Inquiry proceedings held as a result of the said Section 23 Report are also a nullity."

L'article 22 de la Loi sur la Commission d'appel de l'immigration déclare que cette commission "a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion". En conséquence, dans cet appel, la Commission est obligé de déterminer si le rapport prévu par l'article 23 du fonctionnaire à l'immigration A.L. Southam a été établi en conformité avec la Loi.

En général, la Commission estime qu'il est suffisant d'indiquer dans le rapport prévu par l'article 23 les articles particuliers énoncés dans la Loi si l'article montre, avec une clarté suffisante, les allégations à la personne intéressée. Mais, lorsque plusieurs allégations possibles existent, comme dans l'article 5(t) de la Loi sur l'immigration, les principes de justice naturelle ainsi que la Déclaration des droits imposent au fonctionnaire à l'immigration l'obligation de définir plus précisément laquelle de ces allégations est invoquée contre la personne intéressée, et il semble que ce soit ce que l'article 5 du Règlement sur les enquêtes de l'immigration paraît assurer.

Toutefois, la Commission désire préciser ceci: le bien fondé du rapport prévu par l'article 23 doit être examiné dans chaque cause et ceci en relation avec les faits de la cause, afin de décider de sa validité.

Dans cette cause particulière, il est évident que le fonctionnaire à l'immigration Southam a omis de préciser la nature des allégations et ainsi ni l'enquêteur spécial qui a reçu le rapport amenant l'enquête, ni la personne intéressée, quand confrontées à l'enquête avec ce rapport, n'ont saisi la nature des allégations sur lesquelles le fonctionnaire à l'immigration Southam a estimé que M. Ho n'était pas une personne admissible au Canada. La Commission estime que le dit rapport est non seulement ambigué et vague, mais ne possède pas la substance nécessaire pour être considéré comme un rapport fait selon les exigences de l'article 5 du Règlement sur les enquêtes de l'immigration.

En raison de ce qui a été dit plus haut la Commission déclare que dans cet appel, le dit rapport n'est pas en conformité avec les exigences du Règlement sur les enquêtes de l'immigration. Comme le rapport prévu par l'article 23 n'a pas été établi selon la loi, il est nul. Subséquemment, toutes les procédures de l'enquête tenue en raison du rapport prévu par l'article 23 sont aussi nulles.

En conséquence il est inutile d'examiner les autres motifs d'appels avancés par le conseiller de l'appelant, Dr. Pandia.

L'appel est accueilli.

Ottawa le 9 décembre 1969. A souscrit: J.A. Byrne. Essentially, it is about the scope and the implications of Section 25 of the Immigration Act and of Section 5 of the Regulations respecting the conduct of Immigration Inquiries that I differ in opinion with my colleagues.

To determine that scope and those implications it is necessary first to read Section 23 in conjunction with Section 20(1) and Section 12 (2)(3) 7(3) of the Immigration Act, and also in conjunction with Sections 7(a) and 8 of the Immigration Inquiries Regulations.

Section 20 reads:

"(1) Every person, including Canadian citizens and person with Canadian domicile, seeking to come into Canada shall first appear before an Immigration officer at a port of entry or at such other place as may be designated by an Immigration officer in charge, for examination as to whether he is or is not admissible to Canada or is a person who may come into Canada as of right."

Thus, to appear before an Immigration officer at a port of entry or at such other designated place, is the first step to be taken by every person seeking to come into Canada and then the Immigration officer will proceed to make an examination, an entrance examination, as to whether the person may come into Canada as of right or, as in the present instance, the person is admissible into Canada as a visitor for a definite period of time. The person is then legally admitted into Canada as a non-immigrant, and in both cases the ligration officer will proceed pursuant to Section 3 of the Immination Regulations, Part I.

If such a person ceases to be in the particular class in which he was admitted as a non-immigrant (Mr. Ho entered Canada as a visitor on October 27, 1967 for a period to expire, with extensions, on March 31, 1968) and remains in Canada, he shall forthwith report such facts to the nearest Immigration officer and present himself for examination .... and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada. "Sec. 7(3) Immigration Act)

"Present himself for examination" that is for examination as to whether the person is a) an independent applicant in Canada or b) a nominated applicant in Canada and in either cases as to whether the person is admissible into Canada.

Whether an examination (not an inquiry) is made pursuant to Section 20(1) or to Section 7(3) of the Immigration Act, in both cases the examination is to determine the admissibility of the person and such an examination is purely and simply an administrative function or act.

# Dissident, Jean-Pierre Houle:

Avec le plus grand respect dû à mes collègues, je n'expédierais pas cette affaire de la façon proposée par mes doctes collègues, à savoir ... "As the Section 23 Report was not made in accordance with the law, it is a nullity and all the Inquiry proceedings held as a result of the said Section 23 Report are also a nullity."

Je ne partage pas l'opinion de mes collègues principalement au sujet de la portée et des implications de l'article 23 de la Loi sur l'immigration et de l'article 5 du Règlement concernant la tenu des enquêtes de l'immigration.

Afin de préciser les limites de cette protée et de ces implications il est nécessaire, en premier lieu, de lire l'article 23 à la lumière des articles 20(1) et 12(2)(3), 7(3) de la Loi sur l'immigration, et aussi à celle des articles 7(a) et 8 du Règlement sur les enquêtes de l'immigration.

#### L'article 20 dit:

"(1) Quiconque, y compris un citoyen canadien et une personne ayant un domicile canadien, cherche à entrer au Canada, doit paraître devant un fonctionnaire à l'immigration, à un port d'entrée ou à tel autre endroit que désigne un fonctionnaire supérieur de l'immigration, pour un examen permettant de déterminer s'il est admissible ou non au Canada ou s'il est une personne pouvant y entrer de droit."

Ainsi, la première démarche à entreprendre par quiconque cherche à entrer au Canada est de se présenter devant un fonctionnaire à l'immigration, à un port d'entrée ou à tel autre endroit désigné; ensuite le fonctionnaire à l'immigration continuera par un examen, un examen d'entrée, permettant de déterminer si, la personne est admissible au Canada, ou si c'est une personne pouvant y entrer de droit ou, comme dans l'instance présente, si elle est admissible au Canada en qualité de visiteur pour une durée déterminée. Ensuite, la personne est légalement admise au Canada en qualité de non-immigrant et dans les deux cas le fonctionnaire à l'immigration agira conformément à l'article 3 du Règlement sur l'immigration, Partie I.

Si une telle personne cesse d'appartenir à la catégorie particulière dans laquelle elle a été admise en qualité de non-immigrant (M. Ho est entré au Canada à titre de visiteur le 27 octobre 1967 pour une durée qui avec les prolongations s'est achevé le 31 mars 1968) et demeure au Canada , elle doit immédiatement signaler ce fait au fonctionnaire à l'immigration le plus rapporché et se présenter pour un examen..... et elle est réputée, pour les objets de l'examen et à toutes autres fins de la présente loi, une personne qui cherche à être admise au Canada. Article 7(3) de la Loi sur l'immigration

Now Section 23:

"Where an Immigration officer, after examination of a person seeking to come into Canada, is of opinion that it would or may be contrary to a provision of this Act or the Regulations to grant admission to or otherwise let such person come into Canada, he may cause such person to be detained and shall report him to a Special Inquiry Officer."

"After examination" that is after a facts finding and the results of which are incorporated in a form prescribed by the Minister, an administrative act, the Immigration officer comes to the opinion that it would or may be contrary .... etc. The Immigration officer does not determine that the person, the subject of his examination, shall be allowed to come into Canada or to remain in Canada or shall be deported: he merely forms an opinion that it would or may be contrary ..... and, having formed this opinion he expresses it in a report that he shall send to a Special Inquiry Officer. Such a report does not contain, is not an order for deportation, it is not a directive to the Special Inquiry Officer to hold an inquiry; obviously the Immigration officer is not vested which such powers, indeed it is the SIO who after receiving a Section 23 report shall a) in the case of person who seeks to come into Canada from the U.S.A. Alaska or St. Pierre and Miguelon, admit such person or let hime come into Canada or make a deportation order against him, and b) in the case of other persons, admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry, (Sec. 24 (1)(2) Immigration Act.)

It is the SIO who is vested with the powers to inquire into facts, law, regulations, to determine, that is to make a decision, an order, to do all things necessary to provide a full and proper inquiry, as to whether any person shall be allowed to come into Canada, or to remain in Canada or shall be deported. (Sec. 11(2)(3) Immigration Act.) This Section 11 deals with what I may call the "general jurisdiction" of the SIO. How this "jurisdiction" has to be duly and properly exercised, that is a matter dealt with in the Regulations Respecting the Conduct of Immigration Inquiries. I will come to that infra. For the moment, I want to stress the obvious: an appeal lies to the Immigration Appeal Board from an order of deportation made by a SIO after he has conducted a full and proper inquiry and the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law that may arise in relation to the making of an order of deportation. The report made by an Immigration officer is sent to the SIO not to the subject of the examination and it does not determine whether a person shall be deported, it does express the opinion of the Immigration officer that it would or may be contrary to a provision of the Act to grant admission to or otherwise let a person come into Canada.

"Se présenter pour un examen" si la personne est a) requérant indépendent au Canada ou b) un requérant désigné au Canada, dans l'un ou l'autre cas l'examen est pour déterminer si la personne est admissible au Canada.

Si l'examen (non l'enquête) est fait conformément à l'article 20(1) ou à l'article 7(3) de la Loi sur l'immigration, dans les deux cas l'examen est là pour déterminer l'admissibilité de la personne et un tel examen est purement et simplement une fonction ou un acte administratifs.

A présent examinons l'article 23:

"Lorsqu'un fonctionnaire à l'immigration, après avoir examiné une personne qui cherche à entrer au Canada, estime qu'il serait ou qu'il peut être contraire à quelque disposition de la présente loi ou des réglements de lui accorder l'admission ou de lui permettre de venir au Canada, il doit la faire détenir et la signaler à un enquêteur spécial."

"Après avoir examiné" les faits probants et leurs conséquences le tout présenté en la forme prescrite par le Ministre (un acte administratif) le fonctionnaire à l'immigration estime qu'il serait ou qu'il peut être contraire .... etc. Le fonctionnaire à l'immigration ne décide pas si la personne, le sujet soumis à l'examen, doit être autorisée à venir au Canada, ou doit rester au Canada ou doit être expulsée; il formule simplement une opinion sur ce qu'il serait ou qu'il peut être contraire.... après avoir formé cette opinion il l'exprime dans un rapport qui sera envoyé à l'enquêteur spécial. Un tel rapport ne contient pas, n'est pas une ordonnance d'expulsion ni un ordre donné à l'enquêteur spécial de tenir une enquête; evidemment le fonctionnaire à l'immigration n'est pas investi de tels pouvoirs, car c'est bien l'enquêteur spécial qui après avoir reçu le rapport prévu par l'article 23 doit a) dans le cas d'une personne qui cherche venir au Canada des U.S.A., de l'Alaska ou de Saint-Pierre-et-Miquelon admettre cette personne ou lui permettre d'entrer au Canada ou rendre contre elle une ordonnance d'expulsion, et b) dans le cas d'une autre personne, l'admettre ou la laisser entrer au Canada ou il peut la faire détenir en vue d'une enquête immédiate. (Article 24(1)(2) de la Loi sur l'immigration).

L'Enquêteur spécial est investi du pouvoir d'examiner les faits, la loi, les règlements, afin de définir, c'est-à-dire arriver à une décision, lancer une ordonnance, accomplir toutes les choses nécessaires pour assurer une enquête complète et régulière afin d'examiner la question savoir si une personne doit être admise à entrer au Canada, ou à y demeurer ou si elle doit être expulsée (Art. 11(2)(3) de la Loi sur l'immigration). Cet article traite de ce que j'appellerai la "compétence générale" (general jurisdiction) d'un enquêteur spécial. Cette compétence

Pursuant to Section 7(2) of the Immigration Inquiries Regulations the Section 23 report shall, at the commencement of the inquiry, be filed as an exhibit, that is the report becomes part of the record of the inquiry. The SIO may find that the opinion of the Immigration officer is correct or incorrect, good or bad; he may find that the report is incomplete, or defective but he will hold his inquiry not only in pursuance of his "general" jurisdiction under Sec. 11(2) of the Act but also because of Section 8 of the Immigration Inquiries Regulations:

- "8. At the commencement of an inquiry the presiding officer shall
  - (a) read the report....; and
  - (b) inform the person being examined that the purpose of the hearing is to determine whether he is a person who may be admitted, allowed to come into Canada or to remain in Canada, as the case may be, and that in the event a decision is made at the inquiry that he is not such a person, an order shall be made for his deportation from Canada."

The report shall be filed as an exhibit, it shall be read to the person concerned for he has to know why he is called before the SIO: in that sense the report is the causa causans of the inquiry, it activates the inquiry but in se and per se the section 23 Report does not determine the fate of a person who has been the subject of an examination. It is the purpose of the inquiry to determine that fate and the decision to make an order of deportation is made at the inquiry. And it is the Board who will determine whether the inquiry has been full, complete and proper and who will pronounce on the validity and the legality of the order of deportation. An appeal lies to the Board from an order of deportation made by a SIO and not from a report or an expression of opinion by an Immigration officer.

Section 5 of the Immigration Inquiries Regulations provides that "the report so made shall be in writing and shall set out the provisions of the Act or the Immigration Regulations by reason of which the Immigration officer is of the opinion that the person should not be granted admission or allowed to come into Canada".

In this instance the report:

- 1) has been in writing;
- 2) has <u>set out</u> ("indiquer" in the French text) the provisions of the Act or the Immigration Regulations by reason of which the Immigration officer was of the opinion that the person should not be granted admission or allowed to come into Canada. To set out

("jurisdiction") doit être dûment et régulièrement exercée: le Règlement concernant la tenue des enquêtes de l'immigration prescrit en cette matière. Je viendrai à ceci plus loin. Pour le moment je veux insister sur l'évidence suivante: un appel devant la Commission suit une ordonnance d'expulsion rendue par un enquêteur spécial après que celui-ci ait tenu une enquête complète et régulière et la Commission à la compétence unique et exclusive d'entendre et de définir toutes questions, portant sur les faits ou la loi, qui peuvent être soulevées concernant la façon dont a été établie l'ordonnance d'expulsion. Le rapport émis par le fonctionnaire à l'immigration est envoyé à l'enquêteur spécial, non à l'examiné, et le dit rapport ne définit pas si la personne doit être expulsée ou non, mais il exprime l'opinion du fonctionnaire à l'immigration sur ce qu'il serait ou qu'il peut être contraire à quelque disposition de la Loi d'accorder l'admission ou de laisser une personne venir au Canada.

Selon l'article 7(2) du Règlement sur les enquêtes de l'immigration, le rapport prévu par l'article 23 doit, au début de l'enquête, être versé en pièce à l'appui, ainsi le rapport fait partie du procès-verbal de l'enquête. L'enquêteur spécial peut déclarer que l'avis du fonctionnaire à l'immigration est exact ou inexact, bon ou mauvais; il peut déclarer que le rapport est incomplet, ou défectueux mais il tiendra son enquête, non seulement conformément à sa compétence "générale" selon l'article 11(2) de la Loi mais aussi en vertu du l'article 8 du Règlement sur les enquêtes de l'immigration:

- "8. Au début de l'enquête, le président de l'enquête doit
  - (a) lire le rapport ....; et
  - (b) informer la personne examinée que le but de l'audience est de déterminer si elle est une personne qui peut être admise, autorisée à venir au Canada ou à rester au Canada, selon le cas, et que si l'on décide à l'enquête que tel n'est pas son cas, une ordonnance d'expulsion du Canada sera rendue contre elle."

Le rapport sera une pièce à l'appui, il sera lu à la personne intéressée afin qu'elle sache pourquoi elle a été appelée devant l'enquêteur spécial: dans ce sens le rapport est la causa causans de l'enquête, il déclenche l'enquête mais in se et per se le rapport prévu par l'article 23 ne détermine pas le sort de la personne soumise à l'examen. Le sort et la décision de rendre une ordonnance d'expulsion sont établis à l'enquête car tels sont les buts de celle-ci; la Commission, elle, déterminera si l'enquête a été satisfaisante, complète et régulière et elle se prononcera sur la validité ou la légalité de l'ordonnance d'expulsion. Un appel devant la Commission suit une ordonnance d'expulsion rendue par un enquêteur spécial et non un rapport ou l'expression de l'opinion d'un fonctionnaire à l'immigration.

does not imply that the provisions have to be recited or reporduced word for word; it suffices that they are indicated.

- 3) has been filed as any exhibit to the inquiry;
- 4) has been read to the person concerned, at the commencement of the inquiry.

Therefore the report fulfils all the pertinent provisions related to it. At the commencement of the inquiry the report becomes an exhibit, of the inquiry. Since when does an exhibit create jurisdiction? The Section 23 report is nothing but "une pièce introductive d'instance". A Section 23 Report could be defective in its content but such defects do not divest the SIO of his authority to hold a proper and valid inquiry for the power and the authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported are vested in the SIO by virtue of Section 11(2) and (3) of the Immigration Act and not by an expression of opinion stated in an administrative report made of an officer of the Department of Immigration.

An inquiry is not an appeal from a Section 23 Report and, to hold a contrario would, in the final analysis, mean that an appeal lies with the Board from a Section 23 Report; indeed an appeal lies with the Board from an order of deportation made by a Special Inquiry Officer at the conclusion of a proper, full and complete inquiry.

For the appellant: Dr. D.P. Pandia, Barrister and Solicitor; For the respondent: F.D. Craddock, Esq.

L'article 5 du Règlement sur les enquêtes de l'immigration stipule que "le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada, ni autorisée à y venir."

Dans cette instance la rapport:

- 1) a été fourni par écrit;
- 2) a indiqué les dispositions de la Loi ou du Règlement en raison desquelles le fonctionnaire à l'immigration estimait que la personne ne devait pas être admise au Canada ni autorisée à y venir. Le sens d'indiquer n'implique pas que les dispositions doivent être énumérées ou reproduites mot à mot; il est suffisant qu'elles soient indiquées.
- 3) a été déposé comme pièce à l'appui à l'enquête;
- 4) a été lu à la personne intéressée au début de l'enquête.

En conséquence, le rapport est conforme à toutes les dispositions pertinentes prévues pour celui-ci. Au début de l'enquête le rapport devient une pièce à l'appui de l'enquête. Depuis quand une pièce à l'appui créet-elle juridiction? Le rapport prévu par l'article 23 est simplement "une pièce introductive d'instance". Le contenu d'un rapport prévu par l'article 23 peut être défectueux, mais de telles défectuosités n'enlèvent pas à l'enquêteur spécial le pouvoir et l'autorité de tenir une enquête et d'examiner la question à savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée; car l'enquêteur spécial est investi de ce pouvoir et de cette autorité en vertu de l'article 11(2)(3) de la Loi sur l'immigration et non de par l'expression d'une opinion exprimée dans un rapport administratif établi par un fonctionnaire du ministère de l'Immigration.

Une enquête n'est pas un appel d'un rapport prévu par l'article 23, et soutenir le contraire voudrait dire, en dernière analyse, que l'appel devant la Commission vient du rapport prévu par l'article 23; alors qu'un appel, devant la Commission, vient d'une ordonnance d'expulsion rendue par l'enquêteur spécial aux termes d'une enquête régulière, satisfaisante et complète.

Ottawa le 12 décembre 1969.

Pour l'appelant: Dr. D.P. Pandia, avocat;

Pour l'intimé: M. F.D. Craddock.

Herbert George TREFFEISEN (Alias Thomas Joseph SHERMAN) appellant,

ν.

The Minister of Manpower and Immigration

respondent.

Date of the decision: September 9, 1969; File: 69-1237.

Coram: Miss J.V. Scott, chairman, Jean-Pierre Houle, Gérard Legaré.

Evidence - contents of "policeman's" letter alleging criminal record - proof required as to officer's identity and qualifications - admissibility - Meaning of Section 27(3). - Immigration Act: 27(3)

Held: No proof having been adduced as to the identity, capabilities, qualifications, or indeed existence of an R.C.M.P. officer who purportedly wrote a letter containing appellant's supposed criminal record and the facts alleged therein, being hearsay and totally unsupported by any other proof, are not "evidence" of anything.

The Special Inquiry Officer, though not a judge, is a quasi judicial officer, and on appeal from his decision, the Board can, and indeed must, examine the evidence adduced before him and may, in an appropriate case, come to a different conclusion. This is notwith-standing section 27(3), which was passed long before there was any provision for appeal from the Special Inquiry Officer's decision (except to the Minister), and which, in the light of the existing right of appeal to this Court, simply means that the admission of evidence improperly, or a decision mistakenly made on the evidence, does not vitiate the inquiry.

The judgment of the Board was delivered by:

Miss J.V. Scott, chairman:

"i) you are not a Canadian citizen,

ii) you are not a person having Canadian domicile,

iii) you are a person described in subparagraphs (ii), (iii) and (iv) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you have been convicted of an offence under the Criminal Code, have become an inmate of a gaol and that you were a member of the prohibited class at the time of your admission to Canada, namely a person described in paragraph (d) of section 5 of the Immigration Act, persons who have been convicted of a crime involving moral turpitude, except persons whose admission to Canada has been authorized by the Governor-in-Council.

5.

Herbert George TREFFEISEN (Alias Thomas Joseph SHERMAN) appelant,

Le Ministre de la Main-d'oeuvre et de l'Immigration

intimé.

Date de la décision: le 9 septembre 1969; Dossier: 69-1237.

Coram: Mlle J.V. Scott président, Jean-Pierre Houle, Gérard Legaré.

Preuve - contenus de la lettre d'un "policier" présentés comme étant le casier judiciaire - demande de preuve relative à l'identité et à la compétence d'un agent - admissibilité - signification de l'article 27(3) - Loi sur l'immigration: 27(3).

Arrêt: Aucune preuve n'a été administrée quant à l'identité, les capacités, la compétence, ou même l'existence d'un officer de la gendarmerie royale; cet officer a été présenté comme étant l'auteur d'une lettre contenant le prétendu casier judiciaire de l'appelant. Les faits allégués dans cette lettre ne prouvent rien car ils sont du oui-dire et aucune preuve n'a été administrée à leur soutien.

L'enquêteur spécial, bien que n'étant pas juge, est un fonctionnaire quasi-judiciaire, et sur appel de sa décision, la Commission peut, et en fait doit examiner la preuve apportée devant lui, et selon le cas, aboutir à une conclusion différente.

Ceci est nonobstant l'article 27(3) qui a été adopté bien avant qu'il n'y ait de dispositions permettant d'appeler de la décision de l'enquêteur spécial (sauf pour le Ministre); étant donné l'actuel droit d'interjeter appel devant cette Cour, cet article signifie simplement que l'enquête n'est pas rendue nulle par l'admission irrégulière d'une preuve ou d'une décision erronée amenée par la preuve.

Le jugement de la Commission fut rendu par:

# Mlle J.V. Scott, président:

"i) you are not a Canadian citizen,

ii) you are not a person having Canadian domicile, you are a person described in subparagraphs (ii), iii) (iii) and (iv) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you have been convicted of an offence under the Criminal Code, have become an inmate of a gaol and that you were a member of the prohibited class at the time of your

iv) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

The appellant is a landed immigrant who was admitted to Canada on October 10, 1968. He worked for a few months for the Montreal School Board and then proceeded to Vancouver where he worked as a social worker for Kool Aid, a social agency for young people. On February 25, 1969, he was convicted in Vancouver of theft under \$50.00 and was sentenced to pay a fine of \$100.00 or in default, a jail sentence of twenty-one days. He was unable to pay the fine and consequently was confined to Oakalla Prison Farm.

It would appear that that part of the deportation order based on subparagraphs (ii) and (iii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act is entirely supported by the evidence adduced at the inquiry which resulted in the other. Mr. Treffeisen admitted the conviction and the fact that he was an inmate of a jail, and the certificate of conviction was filed as attachment 2 to Exhibit A to the Minutes of Inquiry.

There was no evidence adduced at the inquiry to support the reamining ground for deportation, namely section 19(1)(e)(iv): that Mr. Treffeisen "was a member of the prohibited class at the time of (his) admission to Canada, namely a person described in paragraph (d) of section 5 of the Immigration Act" on the ground that he was a person who had been convicted of a crime involving moral turpitude whose admission to Canada had not been authorized by the Governor-in-Council. Certain documents were filed as Exhibits during the inquiry relating to one Thomas Joseph Sherman. Exhibit F to the Minutes of Inquiry purports to be a copy of the criminal record of this individual furnished by the Federal Bureau of Investigation of the United States Department of Justice. Some six convictions are shown, and 23 charges, for crimes ranging from vagrancy to extortion and fraud.

Exhibit E to the Minutes of Inquiry is a photostat copy of a letter under the letterhead of the Vancouver Police Department, as follows:

"VANCOUVER POLICE DEPARTMENT

March 10, 1969

District Administrator Canadian Immigration Department Foot of Burrard Street, Vancouver 1, B.C. admission to Canada, namely a person described in paragraph (d) of section 5 of the Immigration Act, persons who have been convicted of a crime involving moral turpitude, except persons whose admission to Canada has been authorized by the Governor-in-Council.

iv) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

L'appelant est un immigrant reçu qui a été admis au Canada le 10 octobre 1968. Il a travaillé quelques mois pour la Commission des Ecoles de Montréal et est ensuite allé à Vancouver où il a travaillé en tant que travailleur social pour Kool Aid, bureau d'aide pour les jeunes. Le 25 février 1969 il a été déclaré coupable d'avoir volé une somme d'argent inférieure à \$50 et a été condamné à payer une amende de \$100.00 ou à défaut condamné à deux jours de détention. Il n'a pas été capable de payer l'amende et conséquemment a été détenu à Oakalla Prison Farm.

Il apparaîtrait que cette partie de l'ordonnance d'expulsion fondée sur le sous-alinéa ii) et iii) de l'alinéa (e) du paragraphe (l) de l'article 19 de la Loi sur l'immigration est entièrement soute-nue par la preuve apportée à l'enquête de laquelle résulte l'ordonnance. Mr. Treffeisen a admis la condamnation et le fait d'avoir été emprisonné; le certificat de condamnation a été classé en annexe 2 avec la pièce à l'appui A du procès-verbal de l'enquête.

Aucune preuve produite à l'enquête ne supporte les autres motifs d'expulsion à savoir l'article 19 (1) (e) (iv): que M. Treffeisen "était un membre de la catégorie interdite au moment de son admission au Canada, c'est-à-dire une personne décrite à l'alinéa d) de l'article 5 de la Loi sur l'immigration", parce qu'il a été déclaré coupable d'un crime comportant turpitude morale et que son admission n'a pas été autorisée par le Gouverneur en conseil. Lors de l'enquête certains documents concernant un dénommé Thomas Joseph Sherman ont été versés comme pièces à l'appui. La pièce à l'appui F du procès-verbal de l'enquête présentée comme étant l'extrait du casier judiciaire de cet individu; cet extrait a été délivré par Federal Bureau of Investigation of the United States Department of Justice. Quelques six condamnations y sont établies ainsi que 23 chefs accusations allant de vagabondages à extortion et fraude.

La pièce à l'appui E du procès-verbal de l'enquête est une copie photostatée d'une lettre portant l'en-tête du Bureau de Police à Vancouver. La lettre dit: Dear Sir:

Re: RCMP FPA #332099A - US FBI #141 708E -Vancr PD #52336 Herbert George TREFFEISEN

I have today examined the fingerprinted on F.B.I. fingerprint card relating to one, Thomas Joseph SHERMAN, date of birth July 25, 1938, and certify that these fingerprints are identical to those of one, Herbert George TREFFEISEN, the subject of Vancouver Police Department Criminal Record file number 52336.

Yours truly,

F.H. FARLEY S/sgt (signed) I/C Identification & Warrant Squade"

Exhibit G to the Minutes of Inquiry is a photostat copy of a certification of birth of Thomas Joseph Sherman Jr. issued by the Commonwealth of Pennsylvania, showing date of birth as July 25, 1935, in Philadelphia, the parents being shown as Thomas Joseph Sherman and Helen F. Miller.

A copy of what purports to be the fingerprints of Thomas Joseph Sherman Jr. is attached to Exhibit D to the Minutes of Inquiry. No fingerprint record for Mr. Treffeisen was filed, although he admitted that he had been fingerprinted by the Vancouver Police.

During the inquiry the Special Inquiry Officer questioned Mr. Treffeisen as to his identity. At page 12, Minutes of Inquiry:

- "Q. I wish to refer to Exhibit "A" in which the name Thomas Joseph Sherman appears. Have you ever used or been known by that name?
- A. No, I have not.
- Q. What is the date and place of your birth?
- A. I was born May 11, 1940, in Philadelphia, Pennsylvania."

### and at page 13:

- "Q. I have here a letter from the United States Department of Justice dated 5 March 1969 concerning Herbert George Treffeisen alias Thomas Joseph Sherman to which is attached a set of finger prints. I would ask you to examine this document and tell me, does it refer to you?
  - A. That does not refer to me, no.

THIS LETTER FROM THE DEPARTMENT OF JUSTICE, UNITED STATES, WITH ATTACHED FINGERPRINTS RECORD DATED MARCH 5, 1969 IS ENTERED INTO THIS HEARING AS EXHIBIT "D".

# "VANCOUVER POLICE DEPARTMENT

March 10, 1969

District Administrator
Canadian Immigration Department
Foot of Burrard Street,
Vancouver 1, B.C.

Dear Sir:

Re: RCMP FPS #332099A - LS FBI #141 708E - Vancr PD #52336 Herbert George TREFFEISEN

I have today examined the fingerprinted on F.B.I. fingerprint card relation to one, Thomas Joseph SHERMAN, date of birth July 25, 1938, and certify that these fingerprints are identical to those of one, Herbert George TREFFEISEN, the subject of Vancouver Police Department Criminal Record file number 52336.

Yours truly,

F.H. FARLEY S/sgt (signed) I/C Identification & Warrant Squads"

La pièce à l'appui G du procès-verbal de l'enquête est une copie photostatée d'un extrait de naissance délivré par le Commonwealth de Pennsylvania, et montrant que Thomas Joseph Sherman Jr. est né le 25 juillet 1935 à Philadelphie, les parents étant désignés sous les noms de Thomas Joseph Sherman et Helen F. Miller.

Une copie de ce qui est présenté comme étant les empreintes digitales de Thomas Joseph Sherman est jointe à la pièce à l'appui D du procès-verbal de l'enquête. Il n'y a pas de dactylogramme classé de M. Treffeisen, bien qu'il ait admis avoir donné ses empreintes digitales à la police de Vancouver.

Au cours de l'enquête l'enquêteur spécial a interrogé M. Treffeisen sur son identité. La page 12 du procès-verbal:

- "Q. I wish to refer to Exhibit "A" in which the name Thomas Joseph Sherman appears. Have you ever used or been known by that name?
- A. No, I have not.
- Q. What is the date and place of your birth?
- A. I was born May 11, 1940, in Philadelphia, Pennsylvania."

Q. I also have here a letter from the Vancouver Police Department dated March 10, 1969 addressed to the Canadian Immigration Department and signed by S/sgt Farley who is in charge of Identification and Warrant Squads, in which he states he has examined the finger-prints on F.B.I. fingerprint card relating to one, Thomas Joseph SHERMAN, date of birth July 25, 1938, and certifying that these fingerprints are identical to those of one, Herbert George TREFFEISEN, the subject of Vancouver Police Department Criminal Record file number 52336. I would ask you to examine this and tell me, does it refer to you?

Mr. Treffeisen further testified that his father's name was Herbert George Treffeisen Sr., and his mother was Marion Treffeisen.

At page 16 and 17 of the Minutes of Inquiry:

- "Q. Do you still deny that you have ever been known as Thomas Joseph Sherman?
- A. I do.
- Q. I have here a copy of a record concerning Thomas Joseph Sherman, subject of the United States Department of Justice dated 29 January 1969 listing a series of offences. I would ask you to look at this document and tell me, does it refer to you?
- A. No.

THIS RECORD SUPPLIED BY THE UNITED STATES DEPARTMENT OF JUSTICE DATED 29 JANUARY 1969 IS ENTERED INTO THIS HEARING AS EXHIBIT "F".

- Q. Referring to this record which is Exhibit "F" on page 2, Thomas Joseph Sherman Jr. was convicted of forgery and sentenced to 2 3 years on each count, 5 years probation to run concurrent. This offence of forgery is considered under the Canadian Immigration Act to be a crime involving moral turpitude.
- A. What date was that you are referring to?
- Q. 8th day of April 1965. Moral turpitude is defined in Bouvier's as anything done contrary to justice, honesty or good morals is stated to be done with turpitude. Do you understand the meaning of this definition?
- A. Yes, I do.
- Q. I also have here a birth record concerning Thomas Joseph Sherman Jr. supplied by the Commonwealth Department. I would ask you to examine this document and tell me, does it refer to you?

et page 13:

I have a letter from the United States Department of Justice dated 5 March 1969 concerning Herbert George Treffeisen alias Thomas Joseph Sherman to which is attached a set of fingerprints. I would ask you to examine this document and tell me, does it refer to you?

That does not refer to me, no.

THIS LETTER FROM THE DEPARTMENT OF JUSTICE, UNITED STATES, WITH ATTACHED FINGERPRINTS RECORD DATED MARCH 5, 1969 IS ENTERED INTO THIS HEARING AS EXHIBIT "D".

- I also have here a letter from the Vancouver Police Department dated March 10, 1969 addressed to the Canadian Immigration Department and signed by S/sgt Farley who is in charge of Identification and Warrant Squads, in which he states he has examined the fingerprints on F.B.I. fingerprint card relating to one, Thomas Joseph SHERMAN, date of birth July 25, 1938, and certifying that these fingerprints are identical to those of one, Herbert George TREFFEISEN, the subject of Vancouver Police Department Criminal Record file number 52336. I would ask you to examine this and tell me, does it refer to you?
- A. No, it does not."

Plus loin M. Treffeisen a déclaré que le nom de son père était Herbert George Treffeisen Sr., et celui de sa mère était Marion Treffeisen.

Aux pages 16 et 17 du procès-verbal de l'enquête:

- Do you still deny that you have ever been known as Thomas Joseph Sherman?
- Α. I do.
- I have here a copy of a record concerning Thomas Joseph Sherman, subject of the United States Department of Justice dated 29 January 1969 listing a series of offences. I would ask you to look at this document and tell me, does it refer to you?
- Α. No.

THIS RECORD SUPPLIED BY THE UNITED STATES DEPARTMENT OF JUSTICE DATED 29 JANUARY 1969 IS ENTERED INTO THIS HEARING AS EXHIBIT "F".

A. This birth certificate does not refer to me. The birth record says it is filed in 1935, I was born in 1940 and it does not bear my name."

Almost at the end of the inquiry the Special Inquiry Officer stated (page 18, Minutes of Inquiry):

"Now, Sir, during the course of this hearing, I have presented certain documents to you and you have denied that these documents refer to you. In my capacity as Special Inquiry Officer I have to base my decision given at the end of the inquiry upon the evidence which is adduced during the hearing and subsection (3) of section 27 of the Immigration Act states that I can base my decision on evidence considered credible and trustworthy in the circumstances of each case. Now you have denied using the name of Thomas Joseph Sherman but Exhibits "D" and "E", which are copies of fingerprint records indicate to me that Herbert George Treffeisen and Thomas Joseph Sherman are one and the same person and I must accept this during this hearing as credible evidence as stated in subsection (3) of section 27 of the Immigration Act."

Mr. Treffeisen's viva voce evidence under oath at the inquiry absolutely contradicts the documents filed as exhibits respecting his supposed identity as Thomas Joseph Sherman. His Canadian Immigrant Record Card (Exhibit C), shows his date of birth as May 11, 1940; his nearest relative as his mother "Mrs. Herbert Treffeisen", and his place of birth as Philadelphia, Pa.

Section 27(3) of the Immigration Act, referred to by the Special Inquiry Officer reads as follows:

"27. (3) The Special Inquiry Officer may at the hearing receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case."

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What is "evidence"? The word is not defined in the Canada Evidence Act. Phipson says (10th Edition at p. 2) "In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact". Jowitt: "Evidence: the means employed for the purpose of proving an unknown or disputed fact. Judicial evidence is that which is used on trials or inquiries before courts, judges, commissioners, referees, etc.... The sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue; and no evidence ought to be admitted which is not relevant to the issues."

- Q. Referring to this record which is Exhibit "F" on page 2, Thomas Joseph Sherman Jr. was convicted of forgery and sentences to 2 3 years on each count, 5 years probation to run concurrent. This offence of forgery is considered under the Canadian Immigration Act to be a crime involving moral turpitude.
- A. What date was that you are referring to?
- Q. 8th day of April 1965. Moral turpitude is defined in Bouvier's as anything done contrary to justice, honesty or good morals is stated to be done with turpitude. Do you understand the meaning of this definition?
- A. Yes, I do.
- Q. I also have here a birth record concerning Thomas Joseph Sherman Jr. supplied by the Commonwealth Department. I would ask you to examine this document and tell me, does it refer to you?

A. This birth certificate does not refer to me. The birth record says it is file in 1935, I was born in 1940 and it does not bear my name."

Presqu'à la fin de l'enquête l'enquêteur spécial a déclaré (page 18, procès-verbal de l'enquête):

"Now, Sir, suring the course of this hearing, I have presented certain documents to you and you have denied that these documents refer to you. In my capacity as Special Inquiry Officer I have to base my decision given at the end of the inquiry upon the evidence which is adduced during the hearing and subsection (3) of section 27 of the Immigration Act states that I can base my decision on evidence considered credible and trustworthy in the circumstances of each case. Now you have denied using the name of Thomas Joseph Sherman but Exhibits "D" and "E", which are copies of fingerprint records indicate to me that Herbert George Treffeisen and Thomas Joseph Sherman are one and the same person and I must accept this during this hearing as credible evidence as stated in subsection (3) of section 27 of the Immigration Act."

La preuve viva voce donnée sous serment lors de l'enquête apporte un démenti formel aux documents versés en pièces à l'appui relatifs a sa supposée identité avec Thomas Joseph Sherman. Sa carte d'identité aux fins de l'immigration canadienne (pièce à l'appui C), montre que sa date de naissance est le ll mai 1940, son plus proche parent est sa mère "Mme Herbert Treffeisen" et que son lieu de naissance est Philadelphie en Pensylvanie.

L'enquêteur spécial a cité l'article 27(3) de la Loi sur l'immigration qui dit:

In the instant case, the Special Inquiry Officer had before him conflicting evidence: the sworn statements by Mr. Treffeisen, and the letter of S/sgt Farley (Exhibit E), together with the supposed criminal record of Thomas Joseph Sherman Jr. (Exhibit F). These documents are hearsay evidence, since the statements contained therein cannot be checked by cross-examination. They would appear to conform to an example given by Nokes, An Introduction to Evidence, 4th Edition at page 275:

"No one proves a private document written by A. If the document is ancient execution may be presumed, as shown in a later chapter. Recitals in the documents by A are not proof of what is recited. If the document is modern and execution is not established, statements in the document by A are inadmissible as proof of their truth."

It may be noted that no proof was adduced as to the identity, capabilities, qualiffications, or indeed existence, of S/sgt Farley, who purportedly wrote the letter, Exhibit E. - the letter was never proved. The facts alleged therein, being hearsay and totally unsupported by any other proof, are not "evidence" of anything. The maxim "hearsay is no evidence" is generally held by modern authorities to be too widely stated, but it would appear to apply in the circumstances of the present case.

What is the effect of section 27(3) of the Immigration Act? The discretion given to the Special Inquiry Officer by that section has been dealt with by McRuer C.J.H.C. in Re Robinson (1948) O.R. 487.

That case involved an application for habras corpus with certiorari in aid in respect of a person ordered deported by a board of inquiry pursuant to the Immigration Act. The section of the Act, equivalent to the present section 27(3), read: "In all such cases a Board of Inquiry may at the hearing receive and base its decision upon any evidence considered credible or trustworthy by such Board in the circumstances of each case ..." (S. 16).

The learned Chief Justice stated, at page 495 ff 'My view is that, all the proceedings before the Board having been regularly taken, the proper investigation of the subject matter of the complaint having been held, and the Board having made a finding, it is not now open to me to review the evidence for the purpose of determining whether there was any evidence to support the Board's order. The statute provides for an appeal to the Minister and it is to that tribunal that Parliament has seen fit to commit the duty and jurisdiction to deal with the sufficiency of the evidence.

"In view of the importance of the case I think I should, however, go further and consider the other points argued by counsel.

"27(3) L'enquêteur spécial peut, à l'audition, recevoir toute preuve qu'il estime croyable ou digne de foi dans les circonstances particulières à chaque cas, et baser sa décision sur cette preuve."

Dans ce paragraphe l'utilisation du mot "preuve" est significative.

Qu'est-ce-que "preuve"? Le mot n'est pas défini dans la Loi sur la preuve au Canada. Phipson dit (10e édition p. 2):
"In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact". Jowitt:
"Evidence: the means employed for the prupose of proving an unknown or disputed fact. Judicial evidence is that which is sued on trials or inquiries before courts, judges, commissioners, referres, etc....
The sole object and end of evidence is to ascertain the truth of the several disputed facts or points in issue: and no evidence ought to be admitted which is not relevant to the issues."

Dans cette instance, l'enquêteur spécial a eu par devant lui des preuves contradictoires: les déclarations sous serment de M. Treffeisen, et la lettre de S/sgt Farley (pièce à l'appui E), ajoutés au casier judiciaire de Thomas Joseph Sherman Jr. (pièce à l'appui F). Ces documents sont des preuves par ouf-dire puisque les déclarations qu'ils contiennent ne peuvent être vérifiées par un contre-interrogatoire. Ceci semble concorder avec l'exemple donné par Nokes dans son livre An Introduction to Evidence 4th Edition à la page 275:

"No one proves a private document written by A. If the document is ancient execution may be presumed, as shown in a later chapter. Recitals in the document by A are not proof of what is recited. If the document is modern and execution is not established, statements in the document by A are inadmissible as proof of their truth."

Remarquons que nulle preuve irréfutable n'a été administrée quant à l'identité, les capacités, les qualifications, ou de l'existence du S/sgt Farley qui est censé avoir écrit la lettre, pièce à l'appui E. Le contenu de la lettre n'a jamais été prouvé. Les faits qui y sont allégués, étant du ouf-dire et n'étant pas supportés par quelque autre preuve, ne sont la "preuve" de quelque chose. La maxime "ouf-dire n'est pas preuve" est trop souvent citée disent généralement les autorités modernes mais elle semblerait convenir aux circonstances de la cause présente.

Quel est l'effet de l'article 27(3) de la Loi sur l'immigration? McRuer C.J.H.C. dans Re Robinson (1948) O.R. 487 a traité du pouvoir discrétionnaire donné à l'enquêteur spécial par cet article.

"Even assuming that I am wrong in the conclusion that I have already arrived at, I still think the order must stand. Under the provisions of the Act, Parliament has provided for a board which is an administrative tribunal and not a court. It has also laid down its own code of procedure. Sections 15 and 16 deal with the question of evidence. There is no authority given to subpoena witnesses. While power is given to take evidence under oath there is no requirement that evidence must be taken under oath. By the very nature of the inquiry a wide discretion is, as it should be, vested in the Board as to what it will receive and treat as evidence. The nature of the investigation here under review is one that involves not only the actions of the applicant but his beliefs. On these matters the Board must make a finding. To apply to such an inquiry the rules of evidence applicable to a Court of law would be to frustrate the purpose of the provisions of the statute and would be contrary to well-established authority applicable to administrative tribunals. The Act applies to all aliens coming to Canada from any country in the world. Information respecting their antecedents must necessarily come from abroad. The Board has no power to take evidence abroad and in most cases it would be impracticable to do so. Under section 16 Parliament has left it entirely to the Board to base its decision upon any evidence considered credible or trustworthy by such Board in the circumstances of each case. There is no power given by Parliament to this Court to substitute its decision for that of the Board as to what evidence is to be considered trustworthy". And at page 497 "When the Board has exercised its jurisdiction to admit the material in evidence its reliability as a foundation for a decision was entirely a matter for the Board. It was for the Board to decide how much of it would be believed and what inferences as to the applicant's beliefs and disbeliefs should be drawn therefrom. I am therefore of the opinion that there was evidence before the Board to support its finding."

It must be remembered that this case involved an application for a prerogative writ, and indeed most if not all of the cases dealing with the power of a court to review the discretionary admission of evidence, and the basing of its decision thereon, by an administrative body (which a Special Inquiry Officer is) arose on applications for prerogative writs and are therefore of limited value in considering the power of an appeal court in this regard. The statement of McRuer C.J.H.C., at page 496, is of interest: "The statute provides for an appeal to the Minister and it is to that tribunal that Parliament has seen fit to commit the duty and jurisdiction to deal with the sufficiency of the evidence". Parliament has now seen fit to provide for an appeal to this Board (SS. 11, 12 and 17, Immigration Appeal Board Act).

In Re Brooks (1965) 53 WWR 174 (B.C.S.C.), on a motion for a writ of prohibition based on the grounds that a Special Inquiry Officer had improperly admitted certain documents at an inquiry, Ruttan J. said

Cette cause impliquait une demande d'habeas corpus accompagnée d'une demande de certiorari relative à une personne expulsée par la Commission d'enquête conformément à la Loi sur l'immigration. L'article de la Loi, équivalent au présent article 27(3) dit: "Dans tous les cas la Commission d'enquête peut, à l'audition recevoir toute preuve qu'elle estime croyable ou digne de foi, dans les circonstances particulières à chaque cas ..." (S.16)

Le Juge en chef a déclaré, à la page 495 et suivantes:
'My view is that, all the proceedings before the Board having been regularly taken, the proper investigation of the subject matter of the complaint having been held, and the Board having made a finding, it is not now open to me to review the evidence for the purpose of determining whether there was any evidence to support the Board's order. The statute provides for an appeal to the Winister and it is to that tribunal that Parliament has seen fit to commit the duty and jurisdiction to deal with the sufficiency of the evidence.

"In view of the importance of the case I think I should, however, go further and consider the other points argued by counsel.

"Even assuming that I am wrong in the conclusion that I have already arrived at, I still think the order must stand. Under the provisions of the Act, Parliament has provided for a board which is an administrative tribunal and not a court. It has also laid down its own code of procedure. Sections 15 and 16 deal with the question of evidence. There is no authority given to subpoena witnesses. While power is given to take evidence under oath there is no requirement that evidence must be taken under cath. By the very nature of the inquiry a wide discretion is, as it should be, vested in the Board as to what it will receive and treat as evidence. The nature of the investigation here under review is one that involves not only the actions of the applicant but his beliefs. On these matters the Board must make a finding. To apply such an inquiry the rules of evidence applicable to a Court of law would be to frustrate the purpose of the provisions of the statute and would be contrary to well-established authority applicable to administrative tribunals. The Act applies to all aliens coming to Canada from any country in the world. Information respecting their antecedents must necessarily come from abroad. The Board has no power to take evidence abroad and in most cases it would be impracticable to do so. Under section 16 Parliament has left it entirely to the Board to base its decision upon any evidence considered credible or trustworthy by such Board in the circumstances of each case. There is no power given by Parliament to this Court to substitute its decision for that of the Board as to what evidence is to be considered trustworthy". And at page 497 'When the Board has exercised its jurisdiction to admit the material in evidence its reliability as a foundation for a decision was entirely a matter for the Board. It was for the Board to decide how much of it would be believed and what

"I find this objection to be not a valid one, but, if it were, the error is no more than one of practice, committed in the course of the officer's jurisdiction. As such, it may be a proper matter for appeal, that is, for wrongful admission of evidence, or failure to apply the rules of evidence which are applicable." He went on to adopt the reasoning of McRuer C.J.H.C. in Re Robinson.

The Board is a Court of appeal by virtue of Section 7(1) and (2), Section 11, and Section 22 of the Immigration Appeal Board Act, which read:

"7. (1) The Board is a court of record and shall have an official seal which shall be judicially noticed.

- (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record ..."
- "11. A person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact."
- "22. Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the Immigration Act."
- SS. 12 and 17 also provide a right of appeal.

The Board has, therefore, the normal powers of a Court of in respect of evidence adduced in a lower court whose decision is especialed.

In Halsbury, 2d Ed. Vol. 13, page 541, we find "Upon appeal to the Court of appeal from a judge sitting without a jury, it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

In Montgomerie & Co. v. Wallace - James (1904) A.C. 73, Lord Halsbury said: 'Where a question of fact has been decided by a inferences as to the applicant's beliefs and disbeliefs should be drawn therefrom. I am therefore of the opinion that there was evidence before the Board to support its finding."

Notons que cette cause implique une demande de bref de prérogative et, en effet, la plupart, sinon toutes les affaire traitant du pouvoir d'une cour à réviser la preuve admise discrétionnairement, et l'établissement de sa décision sur celle-ci, par un organe administratif (ce qu'est l'enquêteur spécial), émanent de demandes de bref de prérogatives et sont donc de faible valeur par rapport au pouvoir d'une cour d'appel à ce sujet. La déclaration de McRuer C.J.H.C., à la page 496, est en relation avec notre point: "The statute provides for an appeal to the Minister and it is to that tribunal that Parliament has seen fit to commit the duty and jurisdiction to deal with the sufficiency of the evidence". Le Parlement a crû bon de constituer cette Commission pour les appels (SS. 11, 12 et 17, Loi sur la Commission d'appel de l'immigration).

Dans l'affaire Re Brooks (1965) 53 WWR 174 (B.C.S.C.), une requête de bref de prohibition se fondait sur le motif qu'à l'enquête, l'enquêteur spécial avait admis irrégulièrement certains documents; à ce sujet Ruttan J. disait: "I find this objection to be not a valid one, but, if it were, the error is no more than one of practice, committed in the course of the officer's jurisdiction. As such, it may be a proper matter for appeal, that is, for wrongful admission of evidence, or failure to apply the rules of evidence which are applicable." Il poursuivêt en adoptant le raisonnement de McRuer C.J.H.C. dans l'affaire Re Robinson.

La Commission est une Cour d'appel en vertu de l'article 7(1) et (2), de l'article 11, et de l'article 22 de la Loi sur la Commission d'appel de l'immigration, qui disent:

- "7.(1) La Commission est une cour d'archives et doit avoir un sceau officiel dont il est judiciairement pris connaissance.
  - (2) La Commission a en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des documents, l'exécution de ses ordonnances et autres questions nécessaires ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archive ..."
- "11. Une personne contre qui une ordonnance d'expulsion a été rendue, aux termes des dispositions de la Loi sur l'immigration, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission."

tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court." (14 Can. Abr. 98).

In Benner v. Benner, 62 O.L.R. 360 (Ont. C.A.) Riddell, J.A. stated: "The Court is always loath to reverse the findings of a judicial officer on questions of fact, when he has and the Court has not the advantage of seeing the witnesses; and this, whether or not he states that his decision is based on his observation of their conduct and demeanour: Booth v. Ratté, 21 S.C.R. 637, and many other cases. But this does not mean or imply that the Court abdicates its right and duty to examine all the evidence, and, where there appears manifest error, to rectify the mistake; this is so even in the case of two concurring Courts below: " (14 Can. Abr. 101).

There are many reported cases to this effect. In Wilson v. Kinnear (1925) 2 D.L.R. 641 (9 C.P.C.) Lord Dunedin said "The judgment af a Judge is in a different position from the verdict of a jury. An invalinte Court has not to consider whether there is any evidence on which a judge's findings could be reasonably based; it has to consider whether on the evidence it would have come to the same conclusion".

The Special Inquiry Officer, though not a judge, is a quasi judicial officer, and on appeal from his decision, the Board can, and indeed must, examine the evidence adduced before him, and may, in an appropriate case, come to a different conclusion. This is notwithstanding section 27(3), which was passed long before there was any provision for appeal from the decision of a Special Inquiry Officer, (except to the Minister), and which, in the light of the existing right of appeal to this Court, simply means that the admission of evidence improperly, or a decision mistakenly made on the evidence, does not vitiate the inquiry. To hold otherwise would be to ignore the plain intention of Parliament as set out in the Immigration Appeal Board Act.

In the instant appeal, the Board has examined the "evidence" adduced at the inquiry to support the ground in the deportation order prospecting section 19(1)(e)(iv) of the Immigration Act, and has come to the irresistible conclusion that the Special Inquiry Officer was wrong. Exhibits E and F were in fact inadmissible as evidence, and, having been admitted, proved nothing. Mr. Treffeisen's categorical denials that he was one and the same person as Thomas Joseph Sherman, supported to some degree by the discrepancies in the dates of birth and statement of parentage, must be accepted. This ground of deportation is therefore not in accordance with the law, and must be struck out.

"22. Sous réserve des dispositions de la présente Loi et sauf ce que prévoit la Loi sur l'immigration, la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une demande d'admission au Canada d'un parent conformément aux règlements édictés sous le régime de la Loi sur l'immigration."

L'article 12 et l'article 17 accordent aussi le droit d'interjeter appel.

La Commission a, en conséquence, les pouvoirs normaux d'une Cour d'appel quant à la preuve apportée par une cour inférieure dont la décision est en appel.

Halsbury, 2d Ed. Vol. 13, page 541, déclare "Upon appeal to the Court of appeal from a judge sitting without a jury, it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

Dans l'affaire Montgomerie & Co. c. Wallace - James (1904) A.C. 73, Lord Halsbury a dit: 'Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court." (14 Can Abr. 98).

Dans l'affaire Benner c. Benner, 62 O.L.R. 360 (Ont. C.A.) Riddell, J.A. a déclaré:

"The Court is always loath to reverse the findings of a judicial officer on questions of fact, when he has and the Court has not the advantage of seeing the witnesses; and this, whether or not he states that his decision is based on his observation of their conduct and demeanour: Booth v. Ratté, 21 S.C.R. 637, and many other cases. But this does not mean or imply that the Court abdicates its right and duty to examine all the evidence, and, where there appears manifest error, to rectify the mistake; this is so even in the case of two concurring Courts below:" (14 Can. Abr. 101).

The remaining grounds for deportation are however in accordance with the law, as above noted, and since a deportation order is a severable document, the appeal must be dismissed.

Turning to the Board's jurisdiction under section 15 of the Immigration Appeal Board Act, since Mr. Treffeisen is a landed immigrant in Canada the relevant subsection is section 15(1)(a) which reads:

- "15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
  - (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case,

the Board may direct that the execution of the order of deportation be stayed, or may qyash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

No evidence was adduced before the Board as to the circumstances of the crime for which Mr. Treffeisen was convicted. His counsel at the appeal hearing, Mr. T. D'Arcy Finn, stated that the amount stolen was no more than \$3.00, but statements by counsel are not evidence. However, the sentence imposed - \$100.00 or 21 days for a crime for which the maximum punishment is imprisonment for 2 years (S. 280(b) of the Criminal Code) - allows the Board to infer that the circumstances surrounding the theft were such as to induce leniency in the mind of the judge trying the case. Although Mr. Treffeisen stated at the inquiry that there were similar charges pending against him in Calgary and Saskatoon, no evidence was adduced either at the inquiry or at the appeal to indicate that these charges had been pressed. In view of all the circumstances of this case, therefore: the appellant's status as a landed immigrant, the minor nature of the conviction, and the lack of proof of any other convictions or criminal record whatsoever, the Board orders that the deportation order made June 27, 1969, be quashed.

Dated at Ottawa this 5th day of November 1969.

Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the appellant: T. D'Arcy Finn, Barrister and Solicitor; For the respondent: W. Bernhardt, Esq.

Il y a beaucoup d'affaires rapportées à ce sujet. Dans l'affaire Wilson c. Kinnear (1925) 2 D.L.R. 641 (9. C.P.C.) Lord Dunedin a dit:

"The judgment of a Judge is in a different position from the verdict of a jury. An Appellate Court has not to consider whether there is any evidence on which a judge's findings could be reasonably based; it has no consider whether on the evidence it would have come to the same conclusion".

L'enquêteur spécial, bien que n'étant pas juge, est un fonctionnaire "quasi-judiciaire", et sur appel de sa décision, la Commission peut, et en fait doit examiner la preuve apportée devant lui, et selon le cas, aboutir à une conslusion différente. Ceci, sauf pour le Ministre est, nonobstant l'article 27(3), qui a été adopté bien avant qu'il n'y ait de disposition permettant d'appeler de la décision de l'enquêteur spécial, Sauf pour le Ministre étant donné le droit d'interjeter appel devant cette Cour, cet article signifie simplement que l'admission irrégulière d'une preuve ne rend pas nulle l'enquête. Soutenir le contraire serait ne pas tenir compte de l'intention précise du Parlement, telle que définie dans la Loi de la Commission d'appel de l'immigration.

Dans l'appel en instance, la Commission a examiné la "preuve" apportée à l'enquête qui supportait le motif pour l'ordonnance d'expulsion selon l'article 19(1)(e)(iv) de la Loi sur l'immigration, et la Commission est arrivée à la conclusion inéluctable que l'enquêteur spécial s'est trompé. Les pièces à l'appui E et F étaient, en fait, inadmissibles en catégoriques apportés par M. Treffeisen à l'encontre de sa supposée, identité avec Thomas Joseph Sherman, sont quelque peu soutenu par les la parentée et doivent être considérés par la Commission. Le motif d'expulsion, en conséquence, n'est pas en conformité avec la Loi, et doit être rejeté.

Ainsi que nous l'avons noté plus haut, les autres motifs d'expulsion sont en conformité avec la loi, et puisque l'ordonnance d'expulsion est un document dont le contenu est divisible l'appel doit être rejeté.

Le deuxième moyen d'appel s'appuie sur la compétence de la Commission selon l'article 15 de la Loi sur la Commission d'appel de l'immigration; est pertinent alinéa (a) du paragraphe (l) de l'article (15) puisque M. Treffeisen est un immigrant reçu au Canada. L'article dit:

"15.(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf, que,

> (a) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance d'expulsion avait été rendue le droit d'entrée ou de débarquement."

Aucune preuve n'a été apportée devant la Commission sur les circonstances du crime pour lequel M. Treffeisen a été condamné. l'audition de l'appel son conseiller, M.T. D'Arcy Finn a déclaré que la somme d'argent volée n'excédait pas \$3.00, mais les déclarations du conseiller ne sont pas des preuves. Toutefois, la peine infligée -\$100.00 ou 21 jours de prison pour un crime pour lequel la peine maximum est de deux ans (S. 280(b) du Code Pénal)-autorise la Commission à déduire que les circonstances entourant le vol étaient telles qu'elles disposèrent à l'indulgence le juge dans cette affaire. Bien que M. Treffeisen ait déclaré à l'enquête qu'il y avait des chefs d'accusation similaires contre lui en suspens à Calgary et à Saskatoon, aucune preuve n'a été apportée ni à l'enquête ni à l'appel indiquant que ces chefs d'accusation ont été appuyés. En conséquence, compte tenu de toutes les circonstances propres à cette affaire: le statut d'immigrant reçu de l'appelant, la nature mineure de la condamnation et le manque de preuve à l'appui de toutes autres condamnation ou du casier judiciaire quel qu'il soit, la Commission ordonne que l'ordonnance d'expulsion émise le 27 juin 1969 soit annulée.

Ottawa le 5 novembre 1969.

Ont souscrit: Jean-Pierre Houle et Gérard Legaré.

Pour l'appelant: Me T. D'Arcy Finn; Pour l'intimé: M. W. Bernhardt. 6. Chilian Nathaniel GRAHAM,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 16, 1969; File: 69-676.

Coram: J.C.A. Campbell, Vice-chairman, U. Benedetti, J.A. Byrne.

Inquiry - review of Immigration officer's assessment - basis for SIO and Immigration Appeal Board. - Immigration Regulations: Section 2 of Schedule A.

Held: The Special Inquiry Officer cannot review and alter the "personal assessment" in an application for permanent residence if he considers that this should be so, unless it is shown, in evidence, that the opinion of the assessing officer was manifestly wrong or that he proceeded upon a wrong principle. In an appropriate case the Special Inquiry Officer can send the subject of an inquiry back to the assessing officer to be reassessed. Also, the Board has held that, unless it can be shown that an assessing officer was manifestly wrong or proceeded upon a wrong principle that it will not itself disturb the finding of the assessing officer.

The judgment of the Board was delivered by:

## J.C.A. Campbell:

This is an appeal from a Deportation Order dated 26 March 1969, made by Special Inquiry Officer S. Maletich at the Immigration Office, Toronto, Ontario, in respect of the appellant, Chilian Nathaniel Graham, in the following terms:

"(1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile and that:

(3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot or do not fulfil or comply with the requirements of the Immigration Act or the Regulations by reason of:

(a) in the opinion of an Immigration officer, you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out 6. Chilian Nathaniel GRAHAM

appellant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration

intimé.

Date de la décision: le 16 septembre 1969; Dossier: 69-676.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Enquête - revision de l'appréciation du fonctionnaire à l'immigration - motifs, pour l'enquêteur spécial et la Commission d'appel de l'immigration - Règlement sur l'immigration: article 2 de l'annexe A.

Arrêt: L'enquêteur spécial ne peut pas reviser et modifier l'appréciation au titre "personnalité" d'une demande de résidence permanente s'il croit devoir le faire, à moins que la preuve démontre que l'opinion du fonctionnaire chargé de l'appréciation était manifestement mauvaise ou fondée sur un faux principe. Dans un tel cas, l'enquêteur spécial peut renvoyer le sujet de l'enquête au fonctionnaire chargé de l'appréciation en vue d'une réappréciation. En plus, la Commission a jugé qu'elle ne devait pas modifier la conclusion du fonctionnaire chargé de l'immigration à moins qu'on puisse prouver que celui-ci s'est manifestement trompé ou qu'il s'est fondé sur un faux principe.

Le jugement de la Commission fut rendu par:

# J.C.A. Campbell, vice-président:

Appel d'une ordonnance d'expulsion rendue au bureau de l'Immigration de Toronto, Ontario, le 26 mars 1969 par l'enquêteur spécial S. Maletich contre l'appelant M. Chilian Nathaniel Graham. L'ordonnance d'expulsion se lit comme suit:

"(1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile and that:

(3) you are a member of a prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot or do not fulfil or comply with the requirements of the Immigration Act or the Regulations by reason of:

(a) in the opinion of an Immigration officer, you would not been admitted to Canada for permanent residence if you had been examined outside Canada as an

in Schedule A, as is required by paragraph (f) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended.

(b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1.

(c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1."

The appellant was present at the hearing of his appeal together with his counsel Mr. Mendel M. Green, Barrister. Mr. W. Bernhardt represented the respondent.

The appellant is a fifty-one year old citizen of Jamaica by hirth in that country on 19 September 1917. He is married with four children being the issue of the marriage. His father is deceased but his mother is living in Jamaica as are all the appellant's family. has two brothers and two sisters also residents of Jamaica. Mr. Grain completed successfully six years of primary school. At the in a sixteen he started working as a grocery clerk and worked in 1 it capacity for four years. He then was employed as a baker for firsteen years leaving such employment to set up his own bakery shop. He will rethirs this business which in his absence is being run by He has a cousin in Canada who is a landed immigrant.

The appellant arrived in Canada at Toronto International Airport on 8 June 1968 and was granted admission under 7(1)(c) of the Immigration Act as a non-immigrant (visitor) for a period to expire 30 june 1968. His period of stay as a visitor was subsequently extended to 1 September 1968. Or 23 August 1968 he applied for permanent residence. His application was processed and he received thirty-one units of assessment being nineteen units short of the minimum required.

Mr. Green attacked the deportation order on the basis that the Special Inquiry Officer had refused to deal with the point comment and in particular with the number of units awarded for "ersonal assessment". He submitted that as a Special Inquiry Ficer is also an Immigration officer such Special Inquiry Officer The the power and jurisdiction to change the personal assessment as well as any other of the units awarded. He argued further that the Invigration Regulations do not require proof of a formal apprenticeship and his client in view of his years of training as a baker thould have received, in his submission, three units for apprenticeship. He submitted that the language assessment, which had been

- independant applicant and assessed in accordance with the norms set out in Schedule A, as is required by paragraph (f) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended.
- (b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1.
- (c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1."

L'appelant était présent à l'audition de l'appel avec son conseiller juridique, M. Mendel M. Green, avocat. M. W. Bernahardt occupait pour l'intimé.

L'appelant, âgé de 51 ans, est citoyen de la Jamafque par naissance, il est né le 18 septembre 1917. Il est marié et quatre enfants sont nés de ce mariage. Son père est décédé mais sa mère comme le reste de sa famille demeure en Jamafque. Il a deux frères et deux soeurs qui demeurent aussi en Jamafque. M. Graham a complété avec succès six années d'école primaire. À l'âge de 16 ans, il a commencé à travailler comme commis épicier et il a occupé cet emploi pendant quatre ans. Il a ensuite été employé comme boulanger pendant quinze ans. Il a quitté cet emploi pour ouvrir sa propre boulangerie. Il conserve ce commerce qui, en son absence, est administré par sa femme. Il a un cousin qui est immigrant reçu au Canada.

L'appelant est arrivé au Canada à l'aéroport international de Toronto le 8 juin 1968 et il a été admis comme non immigrant (visiteur) en vertu de l'article 7(1)(c) de la loi sur l'immigration pour une période qui devait se terminer le 30 juin 1968. L'échéance de son séjour comme visiteur a plus tard été reportée au ler septembre 1968. Le 23 août il demandait la résidence permanente. Sa demande fut appréciée et il reçut 31 points, soit 19 de moins que le minimum requis.

M. Green a contesté la validité de l'ordonnance d'expulsion sous prétexte que l'enquêteur spécial avait refusé de tenir compte de l'appréciation par points et en particulier du nombre de points attribués au titre "personnalité". Il a prétendu que l'enquêteur spécial est lui aussi un fonctionnaire à l'immigration et que de ce fait il a le pouvoir et la compétence nécessaire pour modifier l'appréciation de la personnalité de même que le nombre de points attribué aux autres item. Il a par ailleurs soutenu que le Règlement sur l'immigration n'exige pas la preuve d'un apprentissage formel et que son client, étant donné ses

raised by one point by the Special Inquiry Officer, should be increased by one additional point. He argued that Mr. Graham as a person who wished to set up a bakery business in Toronto was entitled to the benefit of twenty-five units under Section 2 of Schedule A. Furthermore if the appellant should be returned to Jamaica he would then be entitled to ten units under (f) of Section 1 of Schedule A.

Mr. Green submitted that under Section 15 of the Immigration Appeal Board Act the appellant would be a credit to Canada. Mr. Graham has been in Canada for well over a year and is now working. It would be a serious injustice if he ware now to be returned to Jamaica.

Mr. Bernhardt submitted that while a Special Inquiry Officer is also an Immigration officer, he is performing a special function when he conducts inquiries in his capacity as a Special Inquiry Officer. He argued that the only source of information which an assessing officer has comes from the applicant. In this case Mr. Graham was an independent applicant and was assessed as a baker. He submitted that the appellant could not return to Jamaica and then claim units for "brranged employment" because he himself would have to write the letter stating such employment had been arranged. He submitted that there were no grounds under Section 15(1)(b)(i) and (ii) of the Immigration Appeal Board Act which would warrant the granting of special relief as the appellant has no roots in this country, no close relatives and is not established here. Also there would be no unusual hardship if he should be returned home. There is no evidence to support a finding that he would suffer political persecution if returned to Jamaica.

It is apparent from the decision of the Special Inquiry Officer (Page 21, Inquiry) that he did review the units of assessment given to the appellant - with the exception of the five units which he received under the heading of "personal assessment". Also that the inecial Inquiry Officer did consider the number of units the appellant would be entitled to receive if he had been assessed under narragraph 2 of Schedule A of the Immigration Regulations, Part 1. The inecial Inquiry Officer came to the conclusion that if the appellant had been awarded twenty-five units under paragraph 2 of Schedule A he would still not qualify as an independent applicant in 1985.

The crucial question to be determined by the Board is whether the Special Inquiry Officer can review and alter the "personal assessment" if he considers that his should be done. In the opinion of the Board he cannot do so unless it is shown, in evidence, that the opinion of the assessing officer was manifestly wrong or that he proceeded upon a wrong principle. In an appropriate case the Special Inquiry Officer can send the subject of an Inquiry back to the assessing officer to be reassessed. In the instant appeal the Special

années de formation comme boulanger aurait dû recevoir, selon lui, trois points pour l'apprentissage. À son avis, il aurait fallu ajouter un autre point à l'appréciation du langage, qui avait déjà été élevée d'un point par l'enquêteur spécial. Il a soutenu, puisque M. Graham, avait l'intention d'établir une boulangerie à Toronto il avait droit à 25 points en vertu de l'article 2 de l'annexe A.

M. Green a maintenu que selon l'article 15 de la Loi sur la Commission d'appel de l'immigration, la présence de l'appelant constituerait un avantage pour le Canada. M. Graham demeure au Canada depuis plus d'un an et en ce moment il y travaille. Ce serait une grave injustice que de le renvoyer en Jama que.

M. Bernhardt a soutenu que même si l'enquêteur spécial est un fonctionnaire à l'immigration, il remplit une fonction spéciale lorsqu'il poursuit une enquête comme enquêteur spécial. À son avis, le fonctionnaire chargé de l'appréciation ne peut tenir ses renseignements que du requérant. Dans cette affaire, M. Graham était un requérant indépendant et il a été apprécié comme boulanger. Il a soutenu que l'appelant ne pouvait pas retourner en Jamafque puis réclamer des points pour "emploi réservé" parce qu'il serait alors obligé d'écrire lui-même la lettre indiquant que cet emploi a été réservé. Il a soutenu qu'il n'y avait pas de motifs conformes à l'article 15(1) (b)(i) et (ii) de la Loi sur la Commission d'appel de l'immigration qui justifierzient l'octroi d'un redressement spécial puisque l'appelant n'a pas d'attache à notre pays, qu'il n'y a pas de proches parents et qu'il n'est pas établi ici. Il ne serait pas scumis à de graves tribulations s'il retournait chez-lui. Il n'existe aucune preuve à l'effet qu'il serait puni pour des activités d'ordre politique s'il retournait en Jamaïque.

Il semble, d'après la décision de l'enquêteur spécial (enquête, page 21) que celui-ci ait révisé les points de l'appréciation attribués à l'appelant, à l'exception des cinq points accordés au titre "personnalité". L'enquêteur spécial a aussi considéré le nombre de points auquel l'appelant aurait eu droit s'il avait été apprécié selon l'article 2 de l'annexe A du Règlement sur l'immigration partie I. L'enquêteur spécial en a conclu que, même s'il avait reçu les 25 points prévus par l'article 2 de l'annexe A, l'appelant n'aurait pas pu satisfaire aux exigences que la norme prévoit pour requérant indépendant se trouvant au Canada.

La question décisive que doit trancher la Commission est celle de savoir si l'enquêteur spécial peut réviser et modifier l'appréciation tion au titre "personnalité" s'il le juge approprié. La Commission estime qu'il ne peut le faire à moins que les preuves démontrent que l'opinion du fonctionnaire chargé de l'appréciation est manifestement erronée ou qu'elle est fondée sur un principe faux. Dans ce cas, l'enquêteur spécial peut renvoyer le sujet de l'enquête au fonctionnaire chargé de l'appréciation en vue d'une réappréciation. Dans cet

Inquiry Officer did not find the assessing officer had been manifestly wrong or had proceeded upon a wrong principle and it is obvious he did not consider that, on the evidence, Mr. Graham should be sent back for reassessment.

The Board has held in several cases that unless it can be shown that an assessing officer was manifestly wrong or proceeded upon a wrong principle that it will not disturb the finding of the assessing officer. In the instant case the assessing officer had before him the appellant's application as an independent applicant in which he gave his intended occupation in Canada as "Baker" (Block 11) and he was assessed as such. The application form makes no mention of the appellant's wish, desire or intention to set himself up in the bakery business.

The Board finds that, on the evidence, the assessing officer was not manifestly wrong or did not proceed upon a wrong principle also that the Special Inquiry Officer reviewed the assessment, except for the units given under the heading "personal assessment" as well as the number of units Mr. Graham would have received if he had been assessed under section 2 of Schedule A. The Board does not agree that on-the-job training which Mr. Graham received during his experience as a baker can be construed as apprenticeship. Being an apprentice connotes someone who is bound to serve and receive instruction from his employer for a specified term. There was a full and proper Inquiry held in this case.

The appellant admitted, through his counsel, that he was not in possession of the required immigrant visa or medical documentation (Inquiry, pages 9 and 10).

The Board having found all grounds in the deportation order to be supported by the evidence the appeal is dismissed under Section 14 of the Immigration Appeal Board Act.

The Board gave careful consideration to the exercise of its jurisdiction under Section 15 of the Immigration Appeal Board Act. As the appellant is not a permanent resident of Canada the relevant portion of the said section is as follows:

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that

(b) in the case of a person who was not a permanent resident at the time of the making of the order

of deportation, having regard to

appel, l'enquêteur spécial n'a pas jugé que le fonctionnaire chargé de l'appréciation s'était manifestement trompé ou qu'il s'était fondé sur un faux principe et il est évident qu'il n'a pas estimé, d'après la preuve, devoir soumettre M. Graham à une réappréciation.

La Commission a décidé à plusieurs reprises de ne pas modifier la conclusion du fonctionnaire chargé de l'appréciation à moins que l'on puisse démontrer que celui-ci s'est manifestement trompé ou qu'il s'est fondé sur un faux principe. Dans l'affaire en instance, le fonctionnaire chargé de l'appréciation avait accès à la demande de l'appelant comme requérant indépendant se trouvant au Canada, demande dans laquelle il déclarait avoir l'intention de s'établir au Canada comme boulanger ("Baker", question l1), et il a fondé son appréciation sur ce renseignement. La demande ne mentionne pas le souhait, le désir ou l'intention de l'appelant d'ouvrir sa propre boulangerie.

La Commission conclut, selon la preuve que le fonctionnaire à l'immigration ne s'est pas minifestement trompé et qu'il ne s'est pas foncé sur un faux principe; elle conclut aussi que l'enquêteur spécial a révisé l'appréciation, exception faite des points attribués au titre "personnalité" de même que du nombre de points que M. Graham aurait reçu si l'appréciation avait été faite selon l'article 2 de l'annexe A. La Commission estime qu'on ne peut considérer comme apprentissage la formation en cours d'emploi reçue par M. Graham au cours de son expéret de recevoir un enseignement de son employeur pour une période de temps définie. Il y a eu dans cette affaire une enquête complète et régulière.

L'appelant a admis, par son avocat, qu'il n'était pas en possession du visa d'immigrant requis ni des documents médicaux (Enquête, pp. 9 et 10).

La Commission ayant trouvé tous les motifs de l'ordonnance l'expulsion étayés par la preuve, l'appel est rejeté en vertu de l'article 14 de la loi sur la Commission d'appel de l'immigration.

La Commission a considéré attentivement les pouvoirs qui ui sont attribués par l'article 15 de la Loi sur la Commission d'appel le l'immigration. L'appelant n'étant pas résident permanent au Canada, a partie de l'article en question qui s'applique à son cas est la uivante:

"15(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité avec l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que

- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship,
- (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief.

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

There is no evidence before the Board on which it can find the existence of reasonable grounds for believing the appellant will be punished for activities of a political character or will suffer unusual hardship if deported. He is reasonably well off financially in this own country where he has an established and successful bakery business. All his family including his wife, children, mother, brothers and sisters, is in Jamaica. The fact the appellant has been in this country since June 1968 and is now employed is not in the opinion of the Board a sufficient compassionate or humanitarian ground which warrants the granting of special relief.

The Board directs that the deportation order be executed as soon as practicable.

Dated at Ottawa, this 6th day of November 1969.

Concurred in by: U. Benedetti and J.A. Byrne.

For the appellant: Mendel M. Green, Barrister and Solicitor;

For the respondent: W. Bernhardt, Esq.

- (b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
  - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulation, ou
  - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre que l'ordonnance avait été rendue, le droit d'entrée ou de débarquement.

La Commission n'a reçu aucune preuve qui démontrerait l'existence de motifs raisonnables de croire que l'appelant sera puni pour des activités d'un caractère politique ou qu'il sera soumis à de graves tribulations s'il est expulsé. Il est raisonnablement à l'aise financièrement dans son propre pays et il possède une boulangerie prospère et bien établie. Toute sa famille, y compris sa femme, ses enfants, sa mère, ses frères et ses sceurs, deneure en Jamafque. La Commission estime que le fait que l'appelant soit demeuré dans notre pays depuis juin 1968 et qu'il y ait trouvé un emploi ne constitue pas un motif de pitié ou une considération d'ordre humanitaire suffisante pour justifier l'octroi d'un redressement spécial.

La Commission ordonne que l'ordonnance d'expulsion soit exécutée le plus tôt possible.

Fait à Ottawa, le 6 novembre 1969.

Ont souscrit: U. Benedetti et J.A. Byrne.

Pour l'appelant: Me Mendel M. Green; Pour l'intimé: M. W. Bernhardt. 7.
Jag Diswar SINGH (also known as Jag Dishwar SINGH), appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: October 17, 1969; File: 69-639.

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne.

Substantive and procedural law - regulation 8(b) - substantial compliance. - Visa and medical certificate as grounds. - Immigration Act: 23; Immigration Regulations: 28(1), 29(1); Immigration Inquiries Regulations; 8(b); Immigration Appeal Board Act: 19(2).

Held: Regulation 8(b) of the Immigration Inquiries Regulations is not a matter of substantive law but one of adjective or procedural law. It is "subsidiary, and prescribes the procedure for obtaining a decision according to substantive law". Substantial compliance pursuant to Regulation 8(b) is sufficient to maintain SIO's jurisdiction.

Byrne, dissenting, held that section 28(1) and 29(1) of the limitation Regulations cannot apply to an application made in Canada as provided pursuant to section 34 of the said regulations, since it renders the Board impotent to arrive at a decision for dismissal pursuant to section 14 of the Immigration Act.

The majority judgment of the Board was delivered by:

#### A.B. Weselak:

This is an appeal from a deportation order dated 15 April 1969, made by Special Inquiry Officer A.K. Beattie at the Immigration Office, Vancouver B.C., in respect of the appellant, Jag Diswar SINGH also known as Jag Dishwar SINGH, in the following terms:

(11) you are not a Canadian citizen;

ii) you are not a person having Canadian domicile;

- ini) you are a member of the prohibited class of persons described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or Regulations by reason of the fact that:
  - a) in the opinion of an Immigration officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A as required by paragraph (f) of subsection (3) of Section 34 of the

7. Jag Diswar SINGH, (aussi connu sous le nom de Jag Dishwar SINGH),

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 17 octobre 1969; Dossier: 69-639.

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne.

Droit positif et code de procédure - règlement 8(b) - substantielle conformité. - Visa et certificat médical administrés en motifs. Loi sur l'immigration: 23; Règlement sur l'immigration: 28(1), 29(1); Règlement sur les enquêtes de l'immigration: 8(b); Loi de la Commission d'appel de l'immigration: 19(2).

Arrêt: Le règlement 8(b) du Règlement sur les enquêtes de l'immigration ne traite pas de droit positif mais de procédure. Il est "subsidiary, and prescribes the procedure for obtaining a decision according to substantive law". Une substantielle conformité au règlement 8(b) est suffisante pour maintenir la compétence de l'enquêteur spécial.

Dissident: Byrne, soutient que l'article 28(1) et l'article 29(1) du Règlement sur l'immigration ne peuvent s'appliquer dans le cas d'une demande demande faite au Canada ainsi que le stipule l'article 34 du Règlement, car cela rendrait la Commission incapable de rejeter un appel selon l'article 14 de la Loi sur l'immigration.

Le jugement majoritaire de la Cour fut rendu par:

#### A.B. Weselak:

Appel d'une ordonnance d'expulsion rendue dans le Bureau de l'immigration de Vancouver, Colombie britannique, par l'enquêteur spécial A.K. Beattie contre l'appelant Jag Diswar SINCH, aussi connu sous le nom de Jag Dishwar SINGH.

L'ordonnance d'expulsion dit:

"i) you are not a Canadian citizen;

ii) you are not a person having Canadian domicile;

iii) you are a member of the prohibited class of persons described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the

Immigration Regulations, Part 1 of the Immigration Act:

 b) you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of Section 28 of the Immigration Regulations, Part 1 of the Immigration Act;

c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1 of the Immigration Act."

The appellant was not present at the hearing but was represented by his counsel Dr. Pandia. The respondent was represented by Mr. Bandy.

Counsel for the appellant attacked the validity of the order on several grounds. His first submission was:

That the Special Inquiry Officer lost jurisdiction to hold the Inquiry when he failed to comply with Section 8(b) of the Immigration Inquiries Regulations which provides:

"8(b) inform the person being examined that the purpose of the hearing is to determine whether he is a person who may be admitted, allowed to come into Canada or to remain in Canada, as the case may be, and that in the event a decision is made at the inquiry that he is not such a person, an order shall be made for his deportation from Canada."

In support of his argument he cited Sections 11(2) and 28(2) of the Irrigration Act which provide:

- "11(2) A Special Inquiry Officer has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported."
- 128(2) Where the Special Inquiry Officer decides that the person concerned is a person who
  - (a) may come into or remain in Canada as of right;
  - (b) in the case of a person seeking admission to Canada, is not a member of a prohibited class;
  - (2) in the case of a person described in paragraph (a),(b), (c), (d) or (e) of subsection (1) of section 19,

he shall, upon rendering his decision, admit or let such person come into Canada or remain therein, as the case may be."

requirements of the Immigration Act or Regulations by reason of the fact that:

a) in the opinion of an Immigration officer you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1 of the Immigration Act;

b) you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of Section 28 of the Immigration Regulations, Part 1

of the Immigration Act:

c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1 of the Immigration Act."

L'appelant n'était pas présent à l'audition de son appel, mais était représenté par son conseiller juridique Dr. Pandia. M. Bandy occupait pour l'intimé.

Le conseiller pour l'appelant a contesté la validité de l'ordonnance sur plusieurs points. Sa première allégation a été:

Que l'enquêteur spécial ne s'étant pas soumis aux exigences de l'article 8(b) du Règlement sur les enquêtes le l'immigration a perdu la compétence de tenir une enquête. Le dit article stipule que:

"8(b) informer la personne examinée que le but de l'audience est de déterminer si elle est une personne qui peut être admise, autorisée à venir au Canada, ou à rester au Canada, selon le cas, et que si l'on décide à l'enquête que tel n'est pas son cas, une ordonnance d'expulsion du Canada sera rendue contre elle."

Au support de son argument il a cité l'article 11(2) et 28(2) de la Loi sur l'immigration qui stipule:

- "11(2) Un enquêteur spécial a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée."
- "28(2) Lorsque 1'enquêteur spécial décide que la personne intéressée
  - (a) peut de droit entrer ou demeurer au Canada

He argued that the Special Inquiry Officer must be strictly guided by this regulation. Otherwise he has no jurisdiction. He cannot have his own jurisdiction or create jurisdiction for himself and that he loses his jurisdiction when he does not comply with this rule which is mandatory and if he departs from the wording or provisions of this section then his jurisdiction is ousted.

The Minutes of Inquiry reveal that at the outset (page 1) the following statement was made by the Special Inquiry Officer:

'Mr. Singh, I have received a report made pursuant to Section 23 of the Immigration Act and I am now going to conduct an Inquiry which may possibly result in your deportation from Canada. As the subject of an Inquiry you have the right at your own expense to be counsel."

The Section 23 report was then read by the subject who admitted it referred to him. The Section 23 report was in the following terms:

- "1. Mr. Jag Dishwar Singh, also known as Jagdiswar Singh s/o Kharan, entered Canada on 17 December 1968. He was granted visitor status under paragraph (c) of subsection (1) of Section 7 of the Immigration Act for a period to expire 16 March 1969. He has now reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act and, as an indevented applicant, is seeking admission to Canada for permanent applicant.
- 2. Pursuant to Section 23 of the Immigration Act, I have to report that I have examined Mr. Jag Dishwar Singh, also known Lackiswar Singh s/o Kharan, and in my opinion, he is not a Canadian citizen or a person who has acquired Canadian contents.
- 3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant his admission to Canada for permanent residence because he is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that he does not fulfill or comply with the conditions or requirements of the Immigration Regulations by reason of:
- paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part I, in that, having given due regard to the information contained in his application, which is attached, and having assessed him in accordance with Schedule A of the Immigration Regulations, Part I, as follows:

- (b) dans le cas d'une personne cherchant l'admission au Canada, n'est pas membre d'une catégorie interdite ou
- (c) dans le cas d'une personne au Canada, n'est pas reconnue, par preuve, une personne décrite à l'alinéa a), b), c), d) ou e) du paragraphe (1) de l'article 19,

il doit, en rendant sa décision, admettre ou laisser entrer cette personne au Canada, ou y demeurer, selon le cas."

Il a soutenu que l'enquêteur spécial doit se tenir à l'intérieur de ces règlements d'une façon stricte: autrement il n'a pas de compétence. Il ne peut avoir sa propre juridiction ni s'en créer une; c'est pourquoi il perd sa juridiction quand il ne se conforme pas au règlement impératif et quand il s'éloigne du sens des mots exprimant les dispositions de l'article alors sa compétence est illicite.

À la lère page du procès-verbal de l'enquête l'enquêteur spécial a fait la déclaration suivante:

"Mr. Singh, I have received a report made pursuant to Section 23 of the Immigration Act and I am now going to conduct an Inquiry which may possibly result in your deportation from Canada. As the subject of an Inquiry you have the right at your own expense to be represented by counsel."

Ensuite, le rapport prévu à l'article 23 a été lu au sujet qui a admis être concerné par ce rapport qui disait:

- "1. Mr. Jag Dishwar Singh, also known as Jagdiswar Singh s/o Kharan, entered Canada on 17 December 1968. He was granted visitor status under paragraph (c) of subsection (1) of subsection (1) of Section 7 of the Immigration Act for a period to expire 16 March 1969. He has now reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act and, as an independent applicant, is seeking admission to Canada for permanent residence.
- 2. Pursuant to Section 23 of the Immigration Act, I have to report that I have examined Mr. Jag Dishwar Singh, also known as Jagdiswar Singh s/o Kharan, and in my opinion, he is not a Canadian citizen or a person who has acquired Canadian domicile.
- 3. I am also of the opinion that it would be contrary to the Immigration Act and Regulations to grant his admission to Canada for permanent residence because he is a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that he does not fulfill or comply with the conditions or requirements of the Immigration Regulations by reason of:

(i) (ii) (iii) (iv) (v) (vi) (vii) (viii)	education and training personal assessment occupational demand occupational skill age language assessment relatives in Canada employment opportunities	5 3 4 10 4 0	units units units units units units units units
	TOTAL	37	units

I have reached the conclusion that he would not have been admitted to Canada for permanent residence if he had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A of the Immigration Regulations, Part I, except with respect to arranged employment:

- (b) he is not in possession of a valid and subsisting immigrant visa issued to him by a Visa Officer as required by subsection (1) of Section 28 of the Immigration Regulations, Part I, and
- (c) his passport does not bear a medical certificate duly signed by a medical officer nor is he in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I."

The Section 23 report was then read and explained item by item to the subject and finally the following question was put to the subject the Special Inquiry Officer:

- 'Q. Do you clearly understand that you will be subject to deportation from Canada if it is established at this Inquiry that the allegations made in the Section 23 are correct?
- A. Yes."
- (1) The Board cites for consideration a statement in the Judgement of Rand J., of the Supreme Court of Canada in De Marigny  $\nu$ . Langlais 1948 D.L.R. at page 165 where he states:

"In the administration of the Immigration Act, R.S.C. 1927, c. 93, what is to be looked for and required is a compliance in substance with its provisions. The case of Samejima v. The King, (1932), 4 D.L.R. 246, S.C.R. 640, 58 Can. C.C. 300 shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman P. Duff called them, or proceedings

(a) paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part I, in that, having given due regard to the information contained in his application, which is attached, and having assessed him in accordance with Schedule A of the Immigration Regulations, Part I, as follows:

(i)	education and training	9	units
(ii)	personal assessment		units
(iii)	occupational demand		units
(iv)	occupational skill	. 4	units
(v)	age	10	units
(vi)	language assessment	4	units
(vii)	relatives in Canada	0	units
(viii)	employment opportunities	2	units

TOTAL 37 units

I have reached the conclusion that he would not have been admitted to Canada for permanent residence if he had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A of the Immigration Regulations Part I, except with respect to arranged employment:

- (b) he is not in possession of a valid and subsisting immigrant visa issued to him by a Visa Officer as required by subsection (1) of Section 28 of the Immigration Regulations, Part I, and
- (c) his passport does not bear a medical certificate duly signed by a medical officer nor is he in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I."

Ensuite le rapport prévu à l'article 23 a été lu et expliqué article par article au sujet; alors l'enquêteur spécial a posé au sujet les questions suivantes:

- "Q. Do you clearly understand that you will be subject to deportation from Canada if it is established at this Inquiry that the allegations made in the Section 23 report are correct?
- A. Yes."
- (1) La Commission demande d'examiner une déclaration tirée du jugement de Rand J., rendu par la Cour Suprême du Canada dans De Marigny c. Langlais 1948 D.L.R.; à la page 165 le juge déclare:

in which a defect in substance appears. In this case the facts are not in dispute, and in relation to P.C. 23 no answer to the order has been suggested. That order has been at the disposal of counsel for almost 2 years, during which efforts have been made both to have it rescinded on considerations of "fairness" and to enable the applicant to obtain transportation or entry to the United States or to Great Britain. In these circumstances it would be trifling with the serious administration of such a law to hold that a lack of formal statement of particulars, if there is any, at this time constitutes a defect of substance in the proceedings. I have no hesitation in holding that such a ground is not now open to the applicant."

(2) The Board also notes the remarks of Duff J., of the Supreme Court of Canada in Samejima v. The King 1932 4 D.L.R. at page 250

"The chief question I desire to discuss is the effect of s. 23. The words, "had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile," are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of the It must not, that is to say, be essentially an order made in claregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry. The order of the Minister must be an order directing the investigation of facts alleged in a complaint made to him; and such facts, unless the enactment is to be reduced to the merest parade of words, must be alleged, of course, in such a manner as to make the allegation reasonably Intelligible to the person against whom the investigation is directed."

and at mage 251

"Courts, of course must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance."

and lament d., at page 255:

"It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence

"In the administration of the Immigration Act, R.S.C. 1927, c. 93, what is to be looked for and required is a compliance in substance with its provisions. The case of Samejima v. The King, (1932), 4 D.L.R. 246, S.C.R. 640, 58 Can. C.C. 300 shows that his Court will not hesitate to condemn "huggermugger" proceedings, as Sir Lyman P. Duff called them, or proceedings in which a defect in substance appears. In this case the facts are not in dispute, and in relation to P.C. 23 no answer to the order has been suggested. That order has been at the disposal of counsel for almost 2 years, during which efforts have been made both to have it rescinded on considerations of "fairness" and to enable the applicant to obtain transportation or dentry to the United States or to Great Britain. In these circumstances it would be trifling with the serious administration of such a law to hold that a lack of formal statement of particulars, if there is any, at this time constitutes a defect of substance in the proceedings. I have no hesitation in holding that such a ground is not now open to the applicant."

(2) La Commission note les remarques de Duff J., de la Cour Suprême du Canada dans la cause Samejima c. The King 1932 4 D.L.R. à la page 250

"The chief question I desire to discuss is the effect of s. 23. The words, "had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile," are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act." It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry. The order of the Minister must be an order directing the investigation of facts alleged in a complaint made to him; and such facts, unless the enactment is to be reduced to the merest parade of words, must be alleged, of course, in such a manner as to make the allegation reasonably intelligible to the person against whom the investigation is directed."

## et à la page 251

"Courts, of course must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance."

must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

- (3) Reference is also made to ex Parte Narine-Singh et al 1954 Ontario Reports where Aylen J., of the Trial Division referring to the Immigration Act stated:
  - "I thought I should deal with the merits of the argument put forward on behalf of the applicants, but quite apart from the merits of the case I consider that I am bound to dismiss the application upon the ground that I have no jurisdiction to deal with this particular type of case at all. There have been a number of cases where the Courts on similar applications have granted relief but they are, so far as I am aware, all cases where the procedure prescribed by the statute was not carried out at all or not properly carried out, as in Samejima v. The King, (1932) S.C.R. 640, (1932) 4 D.L.R. 246, 58 C.C.C. 300, or where the special inquiry officer obviously proceeded on a wrong principle of law as in the recent decision of the Supreme Court of Canada in Regina et al. v. Leong Ba Chai, (1954) S.C.R. 10, (1954) 1 D.L.R. 401, 107 C.C.C. 337."

On appeal this statement was approved by the Court of Appeal and Hope J.A., at page 792 stated:

Tirstly, in the reasons for judgment of the learned trial judge it was held that the special inquiry officer appointed under The Immigration Act, R.S.C. 1952, c. 325, was not in error procedurally, nor did he err on any principle of law. This is made abundantly clear from the reasons, and particularly in the last paragraph on p. 5 of those reasons as they appear in the appeal book, where he says: "The special inquiry officer, in my opinion, acted under the authority and in accordance with the provisions of the Act." The situation, therefore, in the present case differs substantially from the circumstances in Samejima v. The King."

The Board particularly notes in the Samejima case supra the expression "Courts, of course must often draw the distinction between that is merely irregular and what is of such a character that the law does not permit it in substance". Here the distinction is drawn between arbstantive law as opposed to adjective or procedural law.

In a concise law dictionary by P.G. Osborn, adjective law is defined as "So much of the law as relates to practice and procedure". Substantive law is defined as "The actual law as opposed to adjective or procedural law".

In the Dictionary of English Law by Earl Jowitt, adjective law is defined as

## et Lamont J. à la page 255:

"It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

(3) Citation de ex Parte Narine-Singh et al 1954. Lorsque Aylen, juge en première instance, a déclaré au sujet de la Loi sur l'immigration:

"I thought I should deal with the merits of the argument put forward on behalf of the applicants, but quite apart from the merits of the case I consider that I am bound to dismiss the application upon the ground that I have no jurisdiction to deal with this particular type of case at all. There have been a number of cases where the Courts on similar applications have granted relief but they are, so far as I am aware, all cases where the procedure prescribed by the statute was not carried out at all or not properly carried out, as in Samejima v. The King, (1932) S.C.R. 640, (1932) 4 D.L.R. 246, 58 C.C.C. 300, or where the Special Inquiry Officer obviously proceeded on a wrong principle of law as in the recent decision of the Supreme Court of Canada in Regina et al. v. Leong Ba Chai, (1954) S.C.R. 10, (1954) 1 D.L.R. 401, 107 C.C.C. 337."

En appel cette déclaration a été retenue par la Cour d'appel et Hope J.A., à la page 792 a déclaré:

"Firstly, in the reasons for judgment of the learned trial judge it was held that the special inquiry officer appointed under The Immigration Act. R.S.C. 1952, c. 325, was not in error procedurally, nor did he err on any principle of law. This is made abundantly clear from the reasons, and particularly in the last paragraph on p. 5 of those reasons as they appear in the appel book, where he says: "The special inquiry officer, in my opinion, acted under the authority and in accordance with the provisions of the Act." The situation, therefore, in the present case differs substantially from the circumstances in Samejima v. The King."

La Commission note, en particulier, que dans la cause Samejima, citée plus haut, l'expression "Courts, of course must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance". A ce point on doit faire la distinction entre droit positif et le code de procédure (adjective or procedural law).

"In jurisprudence, this means so much of the law as relates to practice and procedure; whereas substantive law means the law which is administered by the courts."

In Black's Law Dictionary De Luxe Fourth Edition, it is defined as  $% \left( 1\right) =\left( 1\right) +\left( 1\right)$ 

"The aggregate of rules of procedure or practice. As opposed to that body of law which the courts are established to administer, (called "substantive law,") it means the rules according to which the substantive law is administered. That part of the law which provides a method for enforcing or maintaining rights, or obtaining redress for their invasion."

In Corpus Juris Secundum Volume 1, Page 1468, it is defined as  $% \left( 1\right) =\left( 1\right) +\left( 1\right) +\left($ 

"The law which pertains to practice and procedure, or the legal machinery by which the substantive law is made effective; the law which prescribes the method of enforcing rights or obtaining redress for their invasion; or which relates to those legal rules which direct the course of proceedings to bring parties into court and the course of the court after they are brought in; the means whereby rights and duties are enforced; a method provided by law for aiding and protecting defined legal rights; procedure; also referred to as the "law of remedy," "procedural law," and remedial law," the terms being used in contradistinction to countantive law.""

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"An enacting clause which affects procedure only is retrospective; for it deals with the mode in which a right of action already existing shall be asserted, and creates no new right of action."

G.D. Nokes in An Introduction to Evidence in the chapter Evidence and Procedure at Page 30 states:

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In tantive law is that which has an independent standing,

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particular circumstances. Adjective law is dependent or

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Halsbury's Laws of England Second Edition, Volume 31 page 517 traite de l'effet des actes législatifs et de leur rétroactivité, et à ce sujet déclare:

"An enacting clause which affects procedure only is retrospective; for it deals with the mode in which a right of action already existing shall be asserted, and creates no new right of action."

G.D. Nokes dans son livre An Introduction to Evidence au chapitre Evidence and Procedure, page 30, soutient:

"Law is sometimes described as substantive or adjective. Substantive law is that which has an independent standing, and determines the rights and obligations of persons in particular circumstances. Adjective law is dependent or subsidiary, and prescribes the procedure for obtaining a decision according to substantive law. Procedural law is often regarded as including both procedure proper and evidence,

Yet neither substantive nor adjective law is divided into the equivalent of watertight compartments. It is now familiar knowledge that, in the infancy of courts of justice, substantive law had at first the look of being secreted in the interstices of procedure, but while in modern times substantive law takes precedence over procedure, the borderline between them is occasionally blurred. Thus it will be seen in the next chapter that some presumptions are really rules of substantive law, though described by a name peculiar to the law of evidence. Again, any boundary between evidence and procedure may sometimes be even less easy to define. For example, the rules which govern the examination of witnesses in giving evidence are largely procedural."

#### And at Page 63

"They (presumptions) are relevant to more topics than one in law of evidence, and will recur in other connections, particularly in relation to the burden of proof and cogency."

In Lambert v. Anglo-Scottish Gen. Com., C.A. Volume 33, Page 639, it is stated in the abridgement  $^{\circ}$ 

"'Procedure' is used in a restricted sense; it has to do with the method of prosecuting a right of action which exists, not with the taking away of a right of action or right of defence that has arisen."

Considering the foregoing citations the Board finds in the instant case that Regulation 8(b) of the Immigration Inquiries Regulations is not a matter of substantive law but one of adjective or recedural law. It is "subsidiary, and prescribes the procedure for other ining a decision according to substantive law".

In this case if the Board finds that there was substantial compliance with this regulation and that the subject was not prejudiced then the fact that there was not strict compliance with the requisition did not detract from the holding of a full and proper Inquiry. This irregularity should not affect the jurisdiction of the Special Inquiry Officer.

The Special Inquiry Officer read the allegations in the Section 23 report to the appellant. He told the appellant on two occasions that "if" the allegations were proved the result would be that "possibly" a deportation order would be made. It follows conversely that if the allegations were not proved no deportation order would be made and the appellant would be allowed to remain in Canada. When asked whether he understood that if the allegation in the Section 23 report were proved he would be deported, the appellant replied "Yes". The appellant knew full well the purpose of the proceedings. Counsel for the appellant admitted on Page 5 (transcript of hearing) that the appellant was not prejudiced.

for evidence is concerned with establishing the facts to which substantive law is applied.

Yet neither substantive nor adjective law is divided into the equivalent of watertight compartments. It is now familiar knowledge that, in the infancy of courts of justice, substantive law had at first the look of being secreted in the interstices of procedure, but while in modern times substantive law takes precedence over procedure, the borderline between them is occasionally blurred. Thus it will be seen in the next chapter that some presumptions are really rules of substantive law, though described by a name peculiar to the law of evidence. Again, any boundary between evidence and procedure may sometimes be even less easy to define. For example, the rules which govern the examination of witnesses in giving evidence are largely procedural."

et page 63

"They (presumptions) are relevant to more topics than one in law of evidence, and will recur in other connections, particularly in relation to the burden of proof and cogency."

Dans le résumé de la cause Lambert c. Anglo-Scottish Gen. Com., C.A. Volume 33, page 639, il est maintenu:

"'Procedure' is used in a restricted sense; it has to do with the method of prosecuting a right of action which exists, not with the taking away of a right of action or right of defence that has arisen."

Prenant en considération les citations précédentes la Commission déclare que dans cette instance le règlement 8(b) de la Loi sur les enquêtes de l'immigration n'a pas trait à la loi positive mais au code de procédure: il est "subsidiary, and prescribes the procedure for obtaining a decision according to substantive law".

Dans cette cause, la Commission déclare que la décision est en substantielle conformité avec ce règlement et que le sujet n'a pas été lésé; le fait qu'il n'y ait pas eu une stricte conformité avec le règlement n'empêche pas de tenir une enquête complète et régulière; cette irrégularité ne devrait pas dépouiller l'enquêteur spécial de sa compétence.

L'enquêteur spécial a lu à l'appelant les allégations contenues dans le rapport prévu à l'article 23. Par deux fois, il a averti l'appelant que de la preuve des allégations résulterait une possible ordonnance d'expulsion. Il va sans dire que si les allégations n'étaient pas prouvées l'appelant serait autorisé à rester au Canada. Quant on lui a demandé si il comprenait que si les allégation contenues dans le rapport prévu à l'article 23 étaient prouvées il serait

Counsel was present at the Inquiry and he raised no objection to the proceedings. The Board as a result finds that there was substantial compliance with Regulation 8(b) of the Immigration Inquiries Regulations and that the irregularity complained of is an irregularity in procedure and did not result in prejudice to the appellant or in an improper Inquiry.

The Board finds that the Special Inquiry Officer substantially complied with this section of the Immigration Inquiries Regulations and that he had not lost jurisdiction to hold the Inquiry.

The second submission of counsel for the appellant was that the "reply" served upon the appellant was not in law compliance with Section 19(2) of the Immigration Appeal Board Act. He argued that failure of the Minister to follow the mandatory requirement of Section 19(2) is a matter of substance and not an irregularity and therefore on this ground the appeal should be allowed. Section 19(2) provides as follows:

"19(2) Every appellant under section 11 or 17 shall be advised by the Minister of the grounds on which the deportation order was made or the refusal to approve the application for admission into Canada was based."

This argument has been dealt with by the Board in Appeal No. 68-5344. Written reasons by Chairman J.V. Scott dismissing the oppeal were handed down on 7 May 1969. At page 7 of the Reasons the orange held that:

"The use of the word 'appellant' in the subsection is unfortunate. The subject of an order of deportation, neatly referred to in the Immigration Act as 'the person concerned', is not an 'appellant' until he serves his notice of appeal after he has himself been served with the order of deportation. The words 'shall be advised by the Minister', do not, however, necessarily imply a time element, and if the person concerned has been served with an order of deportation setting out the grounds thereof with sufficient particularity that he is aware of the case he has to meet, the requirements of section 19(2) have been satisfied, and cannot be affected by the fact that he was not, technically, an appellant, at the time he was served. It cannot have been the intention of the legislature that he be served twice."

In addition Rule 4(c) of the Immigration Appeal Board Rules provides  $\,$ 

"4. Where an officer referred to in subsection (1) is served with a Notice of Appeal, he shall forthwith

expulsé il a répondu "Yes". L'appelant connaissait parfaitement le but de la procédure. Le conseiller de l'appelant a admis en page 5 (de la transcription de l'audition) que l'appelant n'a pas été lésé. Le conseiller était présent lors de l'enquête, amis il ne souleva aucune objection quant à la procédure. En conséquence, la Commission déclare qu'il y a eu une substantielle conformité avec le règlement 8(b) du Règlement sur les enquêtes de l'immigration et les irrégularités dont on s'est plaint sont des vices de forme de procédure qui n'ont ni lésé l'appelant ni faussé les conclusions de l'enquête.

La Commission déclare, que l'enquêteur spécial est resté en substantielle conformité avec cet article du Règlement sur les enquêtes de l'immigration et il n'a donc pas perdu sa compétence en matière d'enquête.

En deuxième moyen d'appel le conseiller de l'appelant a soutenu que la réponse ("reply") donnée à l'appelant n'était pas en conformité avec les dispositions de l'article 19(2) de la Loi sur la Commission d'appel de l'immigration. Il a soutenu que le Ministre n'a pas tenu compte des exigences péremptoires de l'article 19(2) et puisque ceci touche au fond de l'ordonnance et non à un vice de forme l'appel doit donc être accueilli. L'article 19(2) stipule:

"19(2) Chaque appelant en vertu de l'article 11 ou de l'article 17 doit être avisé par le Ministre des motifs sur lesquels se fonde l'ordonnance d'expulsion ou le refus d'approuver la demande d'admission au Canada."

La Commission s'est prononcée en cette matière dans l'appel No. 68-5344. La décision rejettant l'appel a été rendue le 7 mai 1969; en page 7 des motifs du jugement du président J.V. Scott, il est déclaré:

"The use of the word 'appellant' in the subsection is unfortunate. The subject of an order of deportation, neatly referred to in the Immigration Act as 'the person concerned' is not an 'appellant' until he serves his notice of appeal after he has himself been served with the order of deportation. The words 'shall be advised by the Minister', do not, however, necessarily imply a time element, and if the person concerned has been served with an order of deportation setting out the grounds thereof with sufficient particularity that he is aware of the case he has to meet, the requirements by the fact that he was not, technically, an appellant, at the time he was served. It cannot have been the intention of the legislature that he be served twice."

Par ailleurs, la règle 4(c) des Règles de la Commission d'appel de l'immigration stipule que:

(c) serve the appellant with one certified copy of the record."

and rule 1(f) defines "record" as:

"1(f) 'record' means

(i) in respect of an appeal made pursuant to section 11 or 12 of the Act,

(A) a copy of the deportation order,

(B) the Minutes of inquiry or further examination,

(C) the report of the evidence signed by the Special Inquiry Officer,

(D) all exhibits to the inquiry, and

(E) all documents made by or at the instance of the Special Inquiry Officer respecting the proceedings before him."

A perusal of the Record as a whole in this case leaves no doubt in one's mind as to "the grounds on which the deportation order was made". It was served upon the appellant by the Special Inquiry Officer on behalf of the Minister. The Board therefore finds that the provisions of Section 19(2) of the Immigration Appeal Board Act have been complied with. The Board has reviewed the evidence relating to the assessment. The assessment does not appear to be manifestly wrong nor does it appear that the Assessing Officer proceeded upon a wrong principle. The appellant received a total of thirty-seven units out of the required fifty units. Therefore the Board finds that the ground in the order based on Section 34(3)(f) of the Regulations is valid.

The appellant admits he is not in possession of an immigrant visa or of the prescribed medical certificate. Therefore the Board finds the grounds in the order based on Sections 28(1) and 29(1) of the order are valid.

Having found the grounds in the order valid the Board finds that the deportation order has been made in accordance with the Immigration Act and Regulations thereunder and dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

With respect to Section 15 of the Immigration Appeal Board Act, the appellant appears to have nine years of schooling and then was employed as a clerk in Fiji. He does not appear to take an active part in any political activity and there is nothing in the Record to indicate that the appellant will be subject to unusual hardship if deported. The appellant has no close relatives in Canada and does not appear to have established such roots in this

- "4. Lorsqu'un avis d'appel est signifié à un fonctionnaire mentionné au paragraphe (1) celui-ci doit immédiatement:
  - (c) envoyer à l'appelant une copie certifiée du dossier."

dans la règle 1(f) "dossier" signifie:

"1(f)

- (i) à l'égard d'un appel en vertu de l'article 11 ou de l'article 12 de la Loi,
  - (A) une copie de l'ordonnance d'expulsion,
  - (B) le procès-verbal de l'enquête ou de l'examen supplémentaire,
  - (C) le rapport du témoignage signé par l'enquêteur spécial,
  - (D) toutes les pièces versées à l'enquête, et
  - (E) tous les documents préparés par l'enquêteur spécial ou à sa demande, relatifs à l'enquête qu'il a tenue."

L'examen complet du dossier révêle indubitablement les motifs sur lesquels l'ordonnance d'expulsion est fondée. Ils ont été exprimés à l'appelant par l'enquêteur spécial au nom du Ministre. En conséquence, la Commission déclare que les exigences de l'article 19(2) de la Loi sur la Commission d'appel de l'immigration ont été satisfaites. La Commission a examiné la preuve relative à l'évaluation. Il ne semble pas que l'évaluation soit manifestement erronée, ni que le fonctionnaire chargé de l'évaluation ait agi au nom d'un principe erroné. L'appelant a reçu un total de trente-sept points sur les cinquante demandés. En conséquence, la Commission déclare que le motif de l'ordonnance fondé sur l'article 34(3)(f) du Règlement est valide.

L'appelant admet ne pas posséder de visa d'immigrant ni de certificat médical en la forme prescrite. En conséquence, la Commission déclare que les motifs de l'ordonnance fondés l'article 28(1) et 29(1) sont valides.

Les motifs de l'ordonnance étant valides, la Commission déclare que l'ordonnance d'expulsion a été rendue en conformité des prescriptions de la Loi sur l'immigration et du Règlement conséquemment elle rejette l'appel selon l'article 14 de la Loi sur la Commission d'appel de l'immigration.

Dans cette cause la Commission n'utilise pas son pouvoir discrétionnaire prévu à l'article 15 de la Loi sur la Commission d'appel de l'immigration car il apparaît que l'appelant est allé à l'école pendant neuf ans et qu'ensuite il a été employé de bureau à Fiji et il ne semble pas qu'il ait joué un rôle politique important, enfin rien dans le dossier n'indique qu'il serait soumis à de graves

country as would cause him undue distress if he were deported. The Board declines to exercise its discretion and directs that the deportation order be executed as soon as practicable.

Dated at Ottawa, this 28th day of October 1969.

Concurred in by: Jean-Pierre Houle.

#### J.A. Byrne, dissenting:

I concur without reservation in the majority decision that the order is valid based on paragraph (iii), subparagraph (a) of the said order, and that the procedure followed by the Special Inquiry Officer was in accordance with the Immigration Act and the Regulations made pursuant to section 62 of the said Act.

I dissent, however, from the judgement in respect of sub-paragraphs (b) and (c) of paragraph (iii) of the order.

I my opinion subsection (1) of section 28 and subsection (1) of section 29 of the Immigration Regulations cannot apply to an application made in Canada as provided pursuant to section 34 of the Immigration Regulations. The instant case falls within paragraph (3) of section 34 which reads as follows:

- "34.(3) Notwithstanding section 28, an applicant in Canada who
  - (a) if outside Canada would be an independent applicant; and
  - (b) is not in possession of an immigrant visa or letter of pre-examination but, in the opinion of an immigration officer, would on application be issued a visa or letter of preexamination if outside Canada;

may be admitted to Canada for permanent residence if

- (c) he complies with the requirements of the Act and these Regulations;
- (d) he makes application in the form prescribed by the Minister before the expiration of the expiration of the period of temporary stay in Canada authorized for him by an Immigration officer;
- (e) he has not taken employment in Canada without the written approval of an officer of the Department; and

tribulations s'il était expulsé. L'appelant n'a pas de perents proches au Canada et ne semble pas s'y être ettaché de inila maga que l'expulsion lui causerait une grande peime. En conséquence la Commission ordonne que l'ordonnance d'expulsion soit exécutée des que possible.

Ottawa le 28 octobre 1969.

A souscrit: Jean-Pierre Houle.

### J.A. Byrne, dissident:

J'approuve sans réserve la décision majoritaire de la Commission qui maintient la validité de l'ordonnance fondée sur l'alinéa (iii) et le sous-alinéa (a) de ladite ordonnance; la Commission déclare aussi que la procédure suivie par l'enquêteur spécial selon l'article 62 de la Loi était en conformité aux exigences de la Loi sur l'immigration et de Règlement.

Toutefois, je suis contre le jugement, quant aux sous alinéas (b) et (c) de l'alinéa (iii) de l'ordonnance.

J'estime que le paragraphe (1) de l'article 28 et le paragraphe (1) de l'article 29 du Règlement sur l'immigration ne peuvent convenir à une requête faite au Canada ainsi que le prescrit l'article 34 du Règlement sur l'immigration. Cette cause relève de l'alinéa (3) de l'article 34 qui dit:

"34.(3) Nonobstant les dispositions de l'article 28, un requérant se trouvant au Canada qui

(a) s'il se trouvait hors du Canada serait un requérant

indépendent, et

(b) n'est pas en possession d'un visa d'immigrant ou d'une lettre de pré-examen, mais à qui, de l'avis d'un fonctionnaire à l'immigration, serait délivré un visa ou une lettre de pré-examen, s'il se trouvait hors du Canada

peut être admis au Canada en vue d'y résider en permanence

(c) s'il satisfait aux exigences de la Loi et du

présent règlement

(d) s'il fait une demande selon la forme prescrite par le Ministre avant l'expiration de la période pendant laquelle il a été autorisée à séjourner temporairement au Canada par un fonctionnaire à l'immigration

(e) s'il n'a pas accepté d'emploi au Canada sans l'approbation écrite d'une fonctionnaire du ministère; et (f) in the opinion of an Immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment."

### Section 28(1) reads as follows:

"28.(1) Every immigrant who seeks to land in Canada shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and hearing a serial number which has been recorded by the officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada."

A "visa", applying either to an immigrant or a non-immigrant is an international document or stamp certifying that the passport or other travel document has been inspected and found correct. It cannot be obtained in the country of the traveller's destination and it is therefore completely illogical to suggest that a person having refered Canada as a non-immigrant under section 7(1)(c) of the Act, would be in his possession at one and the same time, a non-immigrant and an immigrant visa. Section 34 of the Regulations which is P.C. 967 - 1616, Aug. 16, 1967, in my opinion irrevocably absolves the person from the requirements of Regulation 28(1) irrespective of whether or not he complies with all other requirements of the Act and the Regulations. It cannot of itself, therefore, constitute a valid reason for the deportation of an applicant in Canada.

If, however, the applicant in Canada fails to meet the mount of the Act, or, having complied with all of the requirements of the Act, but has committed an offence under any one of the following headings, subsequent to his admission as a non-immigrant:

- (a) failed to apply within the prescribed period;
- (b) took employment without permission, or
- (c) Tailed to meet the norms of assessment under Schedule A,

he becomes a subject for deportation. An order affecting an applicant in Canada based on any one of the foregoing headings and adequately proven by a Special Inquiry Officer at Board of Inquiry without more, is valid grounds for such a deportation order. The addition of section 28(1) as a grounds, in my opinion, is not only redundant but is completely irrelevant and a misaplication of the law.

(f) si un fonctionnaire à l'immigration est d'avis qu'il aurait été admis au Canada en vue d'y résider en permanence eût-il subi un examen hors du Canada à titre d'immigrant indépendant et son admissibilité eût-elle été établie conformément aux normes énoncées à l'Annexe A, sauf en ce qui à trait à un emploi réservé.

### L'article 28(1) dit:

"28.(1) Tout immigrant qui cherche à être reçu au Canada devra être en possession d'un visa d'immigrant valide et non périmé qui lui aura été délivré par un préposé aux visas et portant un numéro de série qui a été inscrit par le préposé aux visas dans un registre prescrit par le Ministre à cette fin, et, à moins qu'il ne soit en possession d'un tel visa, on ne lui accordera pas la réception au Canada."

Un visa, pour un immigrant ou un non-immigrant, est un document international ou un timbre certifiant que le passeport ou tout autre document de voyage a été vérifié et déclaré exact. Le voyageur ne peut pas l'obtenir dans le pays de sa destination, il est en conséquence tout a fait illogique de suggérer qu'une personne après être entrée au Canada en tant que non-immigrant selon l'article 7(1)(c) de la Loi, aurait en sa possession en même temps un visa de non-immigrant et un visa d'immigrant. J'estime que les dispositions de l'article 34 du Règlement, qui est P.C. 1967-1616, août 16, 1967, irrévocablement dispense la personne des prescriptions du Règlement 28(1) sans tenir compte si la personne satisfait les autres exigences de la Loi et du Règlement. Conséquemment le visa par lui-même ne constitue pas une raison pour valider une ordonnance d'expulsion lancée contre le requérant se trouvant au Canada.

Si, toutefois, le requérant au Camada ne satisfait pas aux exigences de la Loi, ou, si après avoir satisfait aux exigences de la Loi et subséquemment à son admission à titre de non-immigrant, il commet une infraction décrite sous l'une des rubriques suivantes:

- (a) omet de déposer sa demande dans le délai prescrit
- (b) accepte un emploi sans approbation, ou
- (c) ne peut satisfaire aux normes énoncées à l'Annexe A,

il devient passible d'expulsion. Lorsqu'une des rubriques, supra, fonde une ordonnance contre un requérant se trouvant au Canada et est prouvée d'une manière suffisante par l'enquêteur spécial à la Commission d'enquête, la rubrique en elle même constitue un motif valide pour une telle ordonnance. En outre, j'estime que l'article 28(1) du Règlement sur l'immigration qui dit:

Now section 29(1) of the Immigration Regulations which reads as follows:

- "29.(1) No immigrant shall be granted landing in Canada
  - (a) if his passport, certificate of identity or other travel document required by these Regulations does not bear a medical certificate duly signed by a medical officer; or
  - (b) if he is not in possession of a medical certificate, in the form prescribed by the Minister, showing that he does not fall with one of the classes described in paragraph (a), (b), (c) or (s) of section 5 of the Act."

is one of the many Immigration Regulations not specifically mentioned by the Order-in-Council 1967 - 1616, but is nevertheless covered by Regulation 34, paragraph (3) which provides for his admissibility if (c) "he complies with the requirements of the Act and these Regulations", which is, but its terms, all inclusive.

Surely if section 34 of the Regulations makes any sense in law it anticipates that an appellant in Canada having complied with all other requirements of the Act and Regulations, would be given the opportunity of presenting himself for a medical examination by an officer of the Department to determine whether or not he meets with the medical requirements of the Act; failure of which, in itself, constitutes a ground for a deportation order. The applicant in Canada having been denied the right granted him under section 34 of the Regulations, that is to be fully examined pursuant to the Act and Regulations, cannot be deported on the grounds that because of such denial he is unable to determine whether he is medically qualified and, if so, to be issued a certificate.

In my opinion the inclusion of section 29(1) as a grounds for deportation in this er any other case of an applicant in Canada, without having provided the medical evidence of the appellant's disqualification is not only a denial of natural justice but a complete misapplication of the law. The net result is to circumscribe the decision of the Appeal Board. Inclusion of Section 28(1) and Section 29(1) into the deportation order against an applicant, if accented by the Board as valid grounds for a deportation simply renders the Board impotent to arrive at a decision for dismissal missuant to section 14 of the Immigration Appeal Board Act. I remost agree that such is the intent of the Immigration Act and its Regulations. Such a construction of the law would indeed as to an appeal pursuant to section 11 of the Immigration Appeal Board Act

# "29.(1) Aucun immigrant n'obtiendra la réception au Canada

- (a) si son passeport, certificat d'identité ou autre documents de voyage ne contient pas un certificat médical dûment signé par un médecin du Ministère; ou
- (b) s'il n'est pas en possession d'un certificat médical en la forme prescrite par le Ministre, indiquant qu'il ne fait pas partie, d'une des catégories décrites aux alinéas a), b), c) ou s) de l'article 5 de la Loi."

Cet article est des nombreux articles du Règlement sur l'immigration non spécialement mentionné à l'Ordre en Conseil 1967 - 1616, mais est néanmoins inclus dans le règlement 34 paragraphe (3) qui stipule qu'il y a admissibilité si (c) "il satisfait aux exigences de la Loi et du présent Règlement".

Si l'article 34 du Règlement a un sens aux yeux de la loi c'est qu'on s'attend à ce que soit donné à un requérant se trouvant au Canada une possibilité de subir un examen médical (après avoir satisfait à toutes les autres exigences de la Loi et du Règlement) afin que le médecin du ministère décide si il satisfait aux prescriptions de la Loi; un manquement à ceci, en lui-même, constitue un motif pour une ordonnance d'expulsion. Le requérant se trouvant au Canada après s'être vu refusé le droit que lui accorde l'article 34 du Règlement, droit d'être complètement examiné conformément à la Loi et au Règlement, ne peut être expulsé pour ces motifs puisque à cause d'un tel refus il est impossible de déterminer si son état de santé permet la délivrance d'un certificat médical.

J'estime que l'introduction de l'article 29(1) comme motif d'expulsion dans cette cause ou toutes les autres ou le requérant se trouve au Canada, sans avoir donné la preuve médicale de l'incompétence de l'appelant, est non seulement un déni de justice naturelle mais aussi un mauvais usage de la loi. Enfin, la conséquence de ceci est une limite du pouvoir décisionnaire de la Commission d'appel. L'introduction de l'article 28(1) et de l'article 29(1) dans l'ordonnance d'expulsion rendue contre le requérant, si elle est acceptée par la Commission comme motifs valides pour émettre une ordonnance d'expulsion rend la Commission dans l'impossibilité de rejeter un appel selon l'article 14 de la Loi sur la Commission d'appel de l'immigration. Je me refuse à croire que telle est l'intention de la Loi sur l'immigration et de son Règlement. Une telle interprétation de la loi aurait pour conséquences extrêmes, dans l'instance d'appel d'un requérant se trouvant au Canada conformément à l'article 11 de la Loi sur la Commission d'appel by an applicant in Canada, render absurd our deliberations in respect of section 14 at worst, and at best, be an exercise in futility on the part of the appellant.

Dated at Ottawa, this 6th day of November 1969.

For the appellant: Dr. D.P. Pandia, Barrister and Solicitor; For the respondent: Dr. Bandy, Esq.

de l'immigration - de rendre, au pire, nos délibérations absurdes par rapport à l'article 14, et au mieux, futiles, les démarches de l'appelant.

Ottawa le 6 novembre 1969.

Pour l'appelant: Dr. D.P. Pandia, avocat;

Pour l'intimé: M. D. Bandy.

8. Ajay Kumar SINGH,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: October 17, 1969; File: 69-294

Coram: Jean-Pierre Houle, F. Glogowski, J.A. Byrne.

Assessment - conditions precedent. - Immigration Act: 11(2); Immigration Regulations: section 1(c) of Schedule A of Part II.

Held: The assessment should be made in relation to the future, that is in relation to the time when the applicant will become a permanent resident and will be authorized to take employment, not in relation to the time he was in Canada with visitor status.

In a given case where the examination by an Immigration officer is followed immediately or within a few weeks' time by an inquiry, there is the nossibility, if net the probability, that the information gathered is still the same, and so the assessment acceptable; the inquiry would then be a proper one in this regard. But if, as in the instant case, the inquiry is held some five months after the examination, and the new information regarding occupational demand has been gathered by the Department, the Special Inquiry Officer cannot base his decision as to accompany of the inquiry officer cannot be a proper of the time of the inquiry, irregardless of any advantage and section as to the appellant.

The judgment of the Board was delivered by:

Jean-Pierre Houle:

Appeal from an order of deportation made in Vancouver, B.C. on February 13, 1969, against Ajay Kumar SINGH.

The order of deportation reads:

(1) you are not a Canadian citizen,

it) you are not a person having Canadian comicile,

- you are a member of the prohibited class of person described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or the Regulations by reason of the fact that:
  - (a) in the opinion of an Immigration officer you would not have been admitted to Canada for permanent

8. Ajay Kumar SINGH,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 17 octobre 1969; Dossier: 69-294.

Coram: Jean-Pierre Houle, F. Glogowski, J.A. Byrne.

Appréciation - conditions préalables - Loi sur l'Immigration: 11(2); Règlement sur l'Immigration: article 1(c) de l'annexe A de la partie II.

Arrêt: L'appréciation devrait se faire en regard de l'avenir, soit en regard du moment où le requérant deviendra résident permanent et sera autorisé à tenir un emploi, non pas en regard de la période pendant laquelle il séjourne au Canada comme visiteur.

Dans un cas particulier, lorsque l'examen du fonctionnaire à l'immigration est suivi immédiatement ou dans l'espace de quelques semaines par l'enquête, il est possible, sinon probable, que les renseignements recueillis seront les mêmes et l'appréciation est donc acceptable; l'enquête serait alors tenue pour régulière à cet égard. Mais si, comme en l'instance, l'enquête se tient quelque cinq mois après l'examen, et si le ministère a recueilli de nouveaux renseignements sur les occasions d'emploi, l'enquêteur spécial ne peut pas fonder sa décision quant aux occasions d'emploi sur les renseignements antérieurs et il doit ordonner une réappréciation au moment de l'enquête, indépendamment de l'avantage ou du désavantage pour l'appelant.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle:

Appel d'une ordonnance d'expulsion rendue à Vancouver C.B. le 13 février 1969 contre Ajay Kumar SINGH.

L'ordonnance est rédigée comme suit:

"i) you are not a Canadian citizen

ii) you are not a person having Canadian domicile,

iii) you are e member of the prohibited class of person described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Act or Regulations by reason of the fact that:

residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part I of the Immigration Act.

- (b) you are not in possession of a valid and subsisting immigration visa as required by subsection (1) of Section 28 of the Immigration Regulations, Part I of the Immigration Act.
- (c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I of the Immigration Act."

Hearing of the appeal was held at Ottawa, Ontario, on June 21, 1969. Ajay Kumar Singh, the appellant, was present and represented by Dr. D.P. Pandia, Barrister and Solicitor; the respondent, the Minister of Manpower and Immigration, was represented by Mr. F.D. Craddock, of the Department of Manpower and Immigration.

The appellant, single, is a citizen of the United Kingdom and Colonies by birth in Fiji Islands on August 28, 1945; he arrived in Canada, at Vancouver Airport on July 8, 1968 and was admitted as a visitor for the period of one month, and on September 16, 1968, made an application for permanent residence, as an independent applicant.

A Special Inquiry was held on February 11 and 13, 1969, at the end of which an order of deportation was made as recited supra.

The appellant contests the legality and the validity of the aforesaid order of deportation and his learned counsel submitted that "the main issue here is that he (the appellant) did not comply with "ph (f) of subsection (3) of Section 34, that is the assessment, Schedule A, as an independent applicant" (at p. 3 of the transcript of evidence at the hearing).

And at page 5 learned counsel says: "I made an application inquiry that this man was assessed in September, the inquiry field in February, the book they followed in September was the book hat was published in October, but at the time when he was before the inquiry there was a new book published in October. The officer may be perfectly right, I am not questioning his integrity, to give 0 for occupational demand but the issue was at the inquiry the final decision is made. It is at that time, under Section 11 of the Immigration Act the inquiry officer is asked to determine whether this

- (a) in the opinion of an Immigration officer you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independant applicant and assessed in accordance with the norms set out in schedule A as required by paragraph (f) of subsection (3) of section 34 of the Immigration Regulations, Part I of the Immigration Act.
- (b) you are not in the possession of a valid and subsisting immigrant visa as required by subsection (1) of Section 28 of the Immigration Regulations, Part I of the Immigration Act.
- (c) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I of the Immigration Act."

L'audition de l'appel a eu lieu à Ottawa Ontario le 24 juin 1969. L'appelant, Ajay Kumar Singh, était présent et il était représenté par Dr. D.P. Pandia, avocat; M. F.D. Craddock, du ministère de la Main-d'oeuvre et de l'Immigration, occupait pour l'intimé, le ministre de la Main-d'oeuvre et de l'Immigration.

L'appelant, célibataire, né le 28 Août 1945 aux Iles Fiji, est citoyen du Royaume-Uni et de ses Colonies par naissance; il est arrivé au Canada à l'Aéroport de Vancouver le 8 juillet 1968 et il a été admis comme visiteur pour une période d'un mois. Le 16 septembre 1968 il a demandé la résidence permanente comme requérant indépendant.

L'ordonnance d'expulsion ci-devant citée a été émise à la suite d'une enquête spéciale tenue les 11 et 13 février 1969.

L'appelant conteste la légalité et la validité de cette ordonnance d'expulsion et son avocat affirme que "the main issue here is that he (the appelant) dit not comply with paragraph (f) of subsection (3) of section 34, that is the assessment, Schedule A, as an independent applicant" (p. 3 au procès-verbal de la preuve à l'enquête).

Et à la page 5, l'avocat déclare ceci: "I made an application at the inquiry that this man was assessed in September, the inquiry was held in February, the book they followed in September was the book that was published in October, but at the time when he was before the inquiry there was a new book published in October. The officer may be perfectly right, I am not questioning his integrity, to give O for occupational demand, but the issue was at the inquiry

man is admissible or not. That is, whether he will be allowed to stay or to be deported. So he has to decide whether the assessment was correct."

By Mr. Byrne, Member:

"Is or was?"

Dr. Pandia: (at page 6)

"Pardon"

Mr. Byrne:

"Is or was? Whether the assessment is correct or was correct at the time of the assessment?"

Dr. Pandia:

"Is correct".

By Mr. Glogowski, Member:

"At the time of the inquiry?"

Dr. Pandia:

"At the time of the inquiry."

Mr. Glogowski:

"That is your submission?"

Dr. Pandia:

"That is my submission."

To sum up, counsel for the appellant submits that assessment, particularly in relation to occupational demand, should be made at the time of the inquiry especially in the case where quite a long period of time elapses between the examination by an Immigration officer and the holding of the inquiry. According to subparagraph (c) of paragraph 1 of Schedule A (Norms for Assessment of Independent indicants) to Immigration Regulations Part II, occupational demand is assessed: "On the basis of information gathered by the Department of playment opportunities in Canada, units to be assessed according to demand for occupation the applicant will follow in Canada, ranging from fifteen when the demand is strong to zero when there is an oversupply in Canada of workers having the particular occupation of the applicant."

the final decision is made. It is at that time, under section 11 of the Immigration Act the inquiry officer is asked to determine whether this man is admissible or not. That is whether he will be allowed to stay or to be deported. So he has to decide whether the assessment was correct."

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By Mr. Glogowski, Member:

"At the time of the inquiry?"

Dr. Pandia:

"At the time of the inquiry."

Mr. Glogowski:

"That is your submission?"

Dr. Pandia:

"That is my submission."

En somme, le conseiller de l'appelant prétend que l'appréciation, particulièrement en ce qui concerne les occasions d'emploi, devrait se faire au moment de l'enquête, spécialement dans le cas ou il s'écoule une longue période de temps entre l'examen du fonctionnaire à l'immigration et la tenue de l'enquête. Selon le sous-alinéa (c) de l'alinéa l de l'annexe A (Normes d'appréciation des requérants indépendants) au Règlement sur l'immigration, Partie II, les offres d'emploi sont-appréciées "sur la base des renseignements recueillis par le ministère sur les occasion d'emploi au Canada, les points doivent être attribués d'après le nombre de postes vacants dans la profession que le requérant compte exercer au Canada. L'échelle d'appréciation varie entre quinze points, si

"On the basis of information gathered by the Department (of Manpower and Immigration) on employment opportunities in Canada ..." Employment opportunities fluctuate from time to time and related information gathered by the Department are included in some sort of publication or booklet which the Department classifies as "restricted" and therefore, as a policy as well as a practice refuses to divulge that information to all interest persons. According to the fluctuation of employment opportunities several booklets could be published within a certain period of time e.g. three months, six months or a year.

"Units to be assessed according to demand for occupation the applicant will follow in Canada ..." The assessment should be made in relation to the future, that is in relation to the time when the applicant will become a permanent resident and will be authorized to take employment, not in relation to the time he was in Canada with the status of a visitor. In a given case where the examination by an Immigration officer is followed immediately or within a few weeks time by an inquiry held by a Special Inquiry Officer, there is the possibility, if not the probability, that the information gathered by the Department is still the same and therefore the Special Inquiry Officer is amply justified in accepting the assessment, and in that round his inquiry will be proper, unless, it goes without saying, in finds that the assessment is manifestly wrong or based on a wrong principal.

But if the inquiry, as in the present instance, is held some five months after the examination, and that new information regarding that the department has been gathered by the Department, certainly the Special Inquiry Officer cannot base his decision, as far as accountional demand is concerned, on the previous information, and the first order a re-assessment based on information available at the thing of the inquiry. The question as to whether this would be to the advantage or to the disadvantage of the subject of the inquiry is interesting.

Pursuant to Section 11(2) of the Immigration Act "A Special Inquiry Officer has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported" and the Special Inquiry Officer has the authority to "do all other things necessary to provide a full and proper inquiry. (See 11(3)(e)(I.A.))

In the present instance a full and proper inquiry, in the opinion of the Board, has not been provided for the SIO should have ordered a re-assessment, and therefore this appeal should be allowed pursuant to Section 14(a) of the Immigration Appeal Board Act.

la demande est forte, et zéro point si les travailleurs qui exercent la même profession que le requérant sont en surnombre au Canada."

"Sur la base des renseignements recueillis par le ministère (de la Main-d'oeuvre et de l'Immigration) sur les occasions d'emploi au Canada ...." Les occasions d'emploi fluctuent de temps en temps et les renseignements recueillis par le ministère à ce sujet sont compilés dans une sorte de publication ou de brochure classifiée comme "restreinte" par le ministère qui par conséquent, en principe comme en pratique, refuse de divulguer ces renseignements à toutes les personnes intéressées. Selon les fluctuations des occasions d'emploi, plusieurs brochures peuvent être publiées dans une période de temps donnée, soit trois mois, six mois ou un an.

"Les points doivent être attribués d'après le nombre de postes vacants dans la profession que le requérant compte exercer au Canada ...." L'appréciation devrait se faire en regard de l'avenir, c'est-à-dire en regard du moment où le requérant deviendra, résidant permanent au Canada et ou il sera autorisé à tenir un emploi, et non en regard de la période durant laquelle il a séjourné au Canada comme visiteur. Dans un cas particulier, lorsque l'examen du fonctionnaire à l'immigration est suivi immédiatement ou dans l'espace de quelques semaines, par une enquête tenue par l'enquêteur spécial, il est possible, sinon probable, que les renseignements recueillis par le ministère seront les mêmes et l'enquêteur spécial a de très bonnes raisons d'accepter l'appréciation; son enquête sera régulière à cet égard, en autant bien entendu, qu'il ne trouve pas que l'appréciation est manifestement mauvaise ou fondée sur un faux principe.

Mais si, comme en l'instance, l'enquête se tient quelque cinq mois après l'examen, et si entre temps le ministère a recueilli de nouveaux renseignements sur les occasions d'emploi, l'enquêteur spécial ne peut certes pas fonder sa décision en ce qui concerne les occasions d'emploi sur les renseignements antérieurs; il doit ordonner une réappréciation fondée sur les renseignements disponibles au moment de l'enquête. Il n'importe pas de savoir si cette façon de procéder serait à l'avantage ou au désavantage du sujet de l'enquête.

En vertu de l'article 11(2) de la Loi sur l'immigration, "Un enquêteur spécial a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée, et celui de statuer en l'espèce", et l'enquêteur spécial est autorisé à "accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière." (Loi sur l'immigration 11(3)(3)).

Appealed allowed .-

At Ottawa, the 27th day of November 1969. Concurred in by: F. Glogowski and J.A. Byrne.

For the appellant: Dr. D.P. Pandia, Barrister and Solicitor;

For the respondent: F.D. Craddock, Esq.

La Commission estime qu'en l'instance il n'y a pas eu enquête complète et régulière parce que l'enquêteur spécial aurait dû ordonner une réappréciation, et par conséquent l'appel est accueilli en vertu de l'article 14(a) de la Loi sur la Commission d'appel de l'immigration.

Appel accueilli .-

Fait à Ottawa, le 27 novembre 1969, Ont souscrit: F. Glogowski et J.A. Byrne.

Pour l'appelant: Dr. D.P. Pandia, avocat;

Pour l'intimé: M. F.D. Craddock.

editha Belisario BOLANTE,

appellant,

V.

The Minister of Manpower and Immigration

respondent.

Date of the decision: November 13, 1969; File: 69-567.

Coram: Miss J.V. Scott, Chairman, Gérard Legaré, J.A. Byrne.

Non-immigrant - application for permanent residence on day after expiry of period of stay on non-legal day - validity - plain wording of Interpretation Act. - Immigration Act: 19(1)(e)(vi); Immigration Regulations: 34(1) & (3); Interpretation Act: 2(c), 3(1), 25(1), 28(17).

Held: There being no jurisprudence, Canadian, English or American on the noint at issue, we must follow the plain wording of the Interpretation Act (s. 25(1)), since there appears to be nothing in the Immigration Act or Regulations to exclude its application. It must then be had that where an Immigration Officer authorizes a period of temporary stay for a person admitted to Canada, and that period expires of a holiday, as defined in that Act, the person concerned retains the status under which they were admitted until midnight of the day next following that is not a holiday.

Nevertheless, the order is valid, since the Special Inquiry Officer acted in accordance with the dictates of natural justice in varning the appellant that he would consider the evidence concerning in anotherized taking of employment in reaching his decision, and since the evidence clearly supports it, this ground of the order is in accordance with the law.

The judgment of the Board was delivered by:

Wils I.W. Scott, Chairman:

Appeal from an order of deportation made on March 11, 1969, by Special Inquiry Officer G.S. Gallagher, at Toronto, Ontario, against appealant, Editha Belisario BOLANTE, in the following terms:

"(1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile and that:

(3) you are a member of the prohibited class described in paragraph (t) section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:

9. Editha Belisario BOLANTE,

appelante,

V.

Le Ministre de la Main-d'oeuvre et de l'Immigration

intimé.

Date de la décision: le 13 novembre 1969; Dossier: 69-576.

Coram: Mlle J.V. Scott, président, Gérard Legaré, J.A. Byrne.

Non-immigrant - demande de résidence permanente le jour de l'expiration du délai de séjour lorsque ce jour est non-juridique - sens commun de la Loi d'interprétation - Loi sur l'immigration: 19(1)(e)(vi); Règlement sur l'immigration: 34(1) et (3); Loi d'interprétation: 2(c), 3(1), 25(1), 28(17).

Arrêt: Puisqu'il n'existe pas de jurisprudence, canadienne, anglaise ou américaine, sur le point en litige, il faut se conformer au sens commun de la Loi d'interprétation (art. 25(1) puisque ni la Loi ni le Règlement sur l'immigration ne semblent en exclure l'application. Il doit donc être décidé que, lorsqu'un fonctionnaire à l'immigration autorise une période de séjour temporaire pour une personne admise au Canada, et que cette période expire un jour férié, aux termes de cette Loi, la personne intéressée conserve le statut sous lequel elle a été admise jusqu'à minuit du premier jour non-férié suivant.

Cependant, l'ordonnance est valide puisque l'enquêteur spécial a agi conformément aux principes de justice naturelle lorsqu'il a averti l'appelante qu'il tiendrait compte de la preuve concernant son emploi lorsqu'il prendrait sa décision et, puisqu'il est clairement étayé par la preuve, ce motif est conforme à la Loi.

Le jugement de la Commission fut rendu par:

## Mlle J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue à Toronto, Ontario le 11 mars 1969 par l'enquêteur spécial G.S. Gallagher contre l'apellante, Editha Belisario Bolante. L'ordonnance est ainsi formulée:

"(1) you are not a Canadian citizen

(2) you are not a person having Canadian domicile and that:

(3) you are a member of a prohibited class described in paragraph (t) section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:

- (a) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of section 28 of the Immigration Regulations, Part 1;
- (b) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1,
- (c) paragraph (d) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by an Immigration Officer;
- (d) paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you took employment in Canada without the written approval of an officer of the Department;"

The appellant is a 30 year old citizen of the Philippines, unmarried, who came to Canada ostensibly on her way to Mexico, for which country she had a visitor's visa. Her real intention, however, who come to Canada as an immigrant and the evidence showed that she had for a price, engaged to provide her a fact of which she became to hards at the moment of her departure from the Philippines.

The evidence adduced at the inquiry supports the allegation that the appellant was not a Canadian citizen or a person having a Canadian domicile, nor was she in possession of a subsisting immigrant visa or medical certificate.

The third ground of deportation, as set out in paragraph 3(c) of the order must however be examined in the light of the evidence adduced at the inquiry.

Miss Bolante testified that she arrived at Toronto International Airport on Saturday, October 19, 1968. Her passport bears the notation that she was entered on this date as a non-immigrant ection 7(1)(d) of the Immigration Act ("persons passing though Canada to another country") until October 20, 1968. Shortly man her arrival, Miss Bolante proceeded to the house of friends in Toronto, and was advised by them to report to the Department of Immigration as soon as possible. Her hostess, a Mrs. Pascual, telephoned a solicitor who advised her to take Miss Bolante to the Immigration office on University Avenue in Toronto as soon as it opened

- (a) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of section 28 of the Immigration Regulations, Part 1;
- (b) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1,
- (c) paragraph (d) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you did not make application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for you by an Immigration Officer;
- (d) paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you took employment in Canada without the written approval of an officer of the Department;"

L'appelante est une citoyenne des Philippines, âgée de 30 ans, célibataire, qui est venu au Canada alors qu'elle se dirigeait de toute évidence vers le Mexique, ayant obtenu un visa de visiteur pour ce pays. Sa véritable intention était cependant de venir au Canada comme immigrante et les preuves démontrent qu'elle avait été victime d'un agent de voyage malhonnête aux Philippines; celui-ci s'était engagé, contre rémunération, à lui fournir les documents ("papers") nécessaires pour entrer au Canada, mais il avait manqué à son engagement, ce dont elle s'est rendu compte au moment de son départ des Philippines.

Les preuves apportées à l'enquête confirment l'allégation selon laquelle l'appelante n'est pas citoyenne canadienne, n'est pas une personne ayant un domicile au Canada et ne possède ni visa d'immigrant valide ni de certificat médical.

Il faut cependant étudier le troisième motif de l'expulsion, exposé à l'alinéa 3(c) de l'ordonnance, à la lumière des preuves apportées à l'enquête.

Selon le témoignage de M11e Bolante, elle est arrivée à l'aéroport international de Toronto le samedi 19 octobre 1968. Son passeport porte une inscription selon laquelle elle est entrée ce jour-là en qualité de non-immigrant aux termes de l'article 7(1)(d) de la Loi sur l'immigration ("les personnes qui

on Monday morning, — it will be remembered that October 20, 1968, the day fixed for the expiry of Miss Bolante's stay a non-immigrant, was a Sunday.

Miss Bolante duly presented herself at the immigration office some time during the morning of Monday, October 21, 1968 and requested the necessary forms for making application for permanent residence in Canada. These were refused, apparently by a "lady in a black dress" presumably an employee of the Department of Immigration. Questioned on this point by the Special Inquiry Officer, Miss Bolante testified (page 12, Minutes of Inquiry):

- "Q. What did she tell you?
- A. She said we were not allowed to apply for permanent admission, because we had Mexican visa and should proceed to Mexico."

Subsequently, on or about November 6, 1968, Miss Bolante returned to the immigration office and was allowed to file Imm Form 100% (application for permanent residence by an applicant in Canada). This document was filed as Exhibit "I" to the Minutes of Inquiry. This formal application was undoubtedly made too late, but as her counsel, Mr. DeMonte, pointed out, both at the inquiry and at the hearing for her appeal, Miss Bolante did everything she could to make her application as soon as possible.

Should she have been refused the opportunity to file her application on October 21, 1968?

Section 34 of the Immigration Regulations, Part 1, applies to "corplicants in Canada". "Applicant in Canada" is defined in subsection (1) of that section as "a person who has been allowed to enter and remain in Canada as a non-immigrant under subsection 1 of section . "I'll. with cortain exceptions none of which apply to Miss Bolante.

Eubertiem (3) of section 34 applies to "applicants in Canada in if cutside Canada would be an independent applicant" - Miss Tolante's cituation - and one of the conditions of admission of such income to Canada for permanent residence is set out in paragraph (d)

The applicant must make "application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for him by an immigration officer."

Here the period of temporary stay authorized for Miss Bolante expired on a Sunday.

The Interpretation Act, 15 Elizabeth II, Chapter 7, Section 3(1) provides:

traversent le Canada en route vers un autre pays;") jusqu'au 20 octobre 1968. Peu après son arrivée, M1le Bolante s'est rendue à Toronto chez des amis qui lui ont conseillé de se présenter au ministère de l'Immigration le plus tôt possible. Son hôtesse, une dame Pascual, a téléphoné à un conseiller juridique qui lui a recommandé d'accompagner M1le Bolarte au bureau de l'Immigration, avenue University, à Toronto, cès l'ouverture de ce bureau le lundi matin: on se rappelera que le 20 octobre 1968, date à laquelle était fixée l'expiration du séjour de M1le Bolante à titre de non-immigrant, tombait un dimanche.

Mlle Bolante s'est dûment présentée au bureau de l'immigration au cours de la matinée du lundi 21 octobre 1968 et a demandé les formules de demande de résidence permanente au Canada. Il semble qu'une dame portant une robe noire ("lady in a black dress"), probablement une employée du ministère de l'Immigration, les lui ait refusées. Interrogée sur ce point par l'enquêteur spécial, Mlle Bolante a déclaré ceci (Procès-verbal de l'enquête, page 12):

"Q. What did she tell you?

A. She said we were not allowed to apply for permanent admission, because we had Mexican visa and should proceed to Mexico."

Par la suite, soit vers le 6 novembre 1968, M1le Bolante est retournée au bureau de l'immigration et on lui a permis de produire la formule Imm Form 1008 (demande de résidence permanente pour un requérant se trouvant au Canada). Cette demande constitue la pièce à l'appui "I" au procès-verbal de l'enquête. M1le Bolante avait sans aucun doute fait sa demande officielle trop tard, mais comme l'a fait remarquer son conseiller juridique, M. DeMonte, à l'enquête et à l'audition de l'appel, elle avait tenté par tous les moyens de la déposer le plus tôt possible.

'Aurait-il fallu lui refuser l'occasion de déposer sa demande le 21 octobre 1968?

L'article 34 de la partie I du Règlement sur l'immigration s'applique aux "requérants se trouvant au Canada". Le paragraphe (1) de cet article définit "requérant se trouvant au Canada" comme "une personne qui a obtenu la permission d'entrer et de demeurer au Canada, à titre de non-immigrant, aux termes du paragraphe (1) de l'article 7" avec certaines exceptions dont aucune ne s'applique à Mlle Bolante.

Le paragraphe (3) de l'article 34 s'applique au "requérant se trouvant au Canada qui, s'il se trouvait hors du Canada, serait un requérant indépendant", ce qui est le cas de M1le Bolante; une des conditions auxquelles une telle personne peut être admise au Canada pour y résider en permanence est formulée comme suit à l'alinéa (d) de ce paragraphe:

"(1) Every provision of the Act extends and applies, unless a contrary intention appears, to every enactment, whether enacted before of after the commencement of this Act."

"Enactment" is defined by Section 2(c) as "an Act or a regulation or any portion of an Act or regulation".

Section 28(17) defines holiday as meaning, among other things, "Sunday", and Section 25(1) provides:

"25.(1) Where the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday."

There appears to be nothing in the Immigration Act or Regulations to exclude the application of the Interpretation Act.
Following the plain reaning of the sections quoted, it would appear that the time authorized for the temporary stay of Miss Bolante actually expired on Monday, October 21, 1968.

Two objections may be raised to this statement:

- 1) The period of temporary stay is not fixed by the regulations, but by an Immigration officer.
- 2) Immigration offices at large ports of entry, such as Toronto International Airport are open 24 hours a day, seven days a week.

Dealing with these objections in order: the "time limited" in Section 34(3)(d) of the Immigration Regulations is that authorized for the applicant by an Immigration officer. It follows therefore, that the expiry date fixed by that officer becomes the "time limited" by scattle; though the actual time fixed is discretionary, once the expiry date is set it becomes a statutory period, for the purposes of Section 34(3) - and those of Section 19(1)(3)(vi) of the Act and is not merely a private decision or act by the official in question. Section 25(1) of the Interpretation Act therefore applies.

The Interpretation Act, in defining "holiday" makes no exaction whatsoever in respect of offices, departments, institutions, ather bodies which may in fact be open or available to the public of purforming their public functions on any of the days included in the infinition. The fact that the Immigration Office at the Airport way have been open on Sunday, October 20, 1963, cannot affect the plain reaning of the words in Section 25(1) of the Interpretation let: since the time limited for "doing the thing" i.e. applying for normanent residence, expired on a holiday - Sunday October 20, 1968, the "thing" may be done on the day next following that is not a holiday. i.e. Monday, October 21, 1969.

Le requérant doit faire "une demande selon la forme prescrite par le Ministre avant l'expiration de la période pendant laquelle il a été autorisé à séjourner temporairement au Canada par un fonctionnaire à l'immigration."

Dans le cas qui nous concerne, le séjour temporaire autorisé pour M1le Bolante se terminait un dimanche.

En vertu de la Loi d'interprétation, 16 Elizabeth II, chapitre 7, article 3(1),

"(1) A moins qu'une intention contraire n'apparaisse, chacune des dispositions de la présente loi s'étend et s'applique à tout texte législatif, que celui-ci soit édicté avant ou après l'entrée en vigueur de la présente loi."

"Texte législatif" est défini par l'article 2(c) comme étant "une loi ou un règlement ou toute partie d'une loi ou d'un réglement."

L'article 28 (17) définit un jour férié comme signifiant, entre autres choses, "tout dimanche", et l'article 25 (1) stipule:

"25. (1) Si le fait fixé pour l'accomplissement d'une chose expire ou tombe un jour férié, la chose peut être accomplie le premier jour non-férié suivant,"

Rien dans la Loi sur l'immigration ou dans ses Règlements ne semble devoir exclure l'application de la Loi d'interprétation. Selon le sens littéral des articles cités, il semble bien que la durée du séjour temporaire autorisé pour Mlle Bolante se terminait en fait le lundi 21 octobre 1968.

On peut poser deux objections à cette affiramtion:

- 1) La durée du séjour temporaire n'est pas fixée par les Règlements mais par un fonctionnaire à l'immigration.
- 2) Dans les ports d'entrée importants, comme l'aéroport international de Toronto, les bureaux de l'immigration sont ouverts 24 heures par jour, sept jours par semaine.

Examinons l'une après l'autre ces deux objections. Le "délai fixé" par l'article 34 (3) (d) du Règlement sur l'immigration est celui qu'autorise le fonctionnaire à l'immigration pour le requérant. Il en découle par conséquent que la date d'expiration fixée par ce fonctionnaire devient le "délai fixé" aux termes de la loi; quoique la durée du délai soit laissée à la discrétion de ce fonctionnaire, la date d'expiration, une fois fixée, devient une période légale aux termes de l'article 34 (3) du Règlement et de

Section 19(1)(3)(vi) of the Immigration Act is relevant to this discussion. That section reads as follows:

- "19.(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an Immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars concerning
  - (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
    - (vi) entered Canada as a non-immigrant and remains therein after ceasing to be a non-immigrant or to be in the particular class in which he was admitted as a nonimmigrant,"

Section 19(2) provides:

"19(2). Every person who is found upon an inquiry duly held by a Special Inquiry Officer to be a person described in subsection (1) is subject to deportation."

Although this section was not a ground in the deportation are made against Miss Bolante, if she ceased to be a non-immigrant at manight, October 20, 1969, she could not thereafter legally be "an applicant in Canada" within the meaning of Section 34 of the Immigration Regulations, Part I.

Let us again examine the wording of section 25(1) of the

"Where the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday" (italics mine).

A person admitted as a non-immigrant for a fixed period of time, which as above indicated, is a statutory period one the expiry date is set, must, by implication or by actual atstutory provision. "do a thing" within that period. The alternative "things" which the present appellant could have done withing the "time limited" were

- 1) depart from Canada, or
- 2) apply for permanent residence as an applicant in Canada.

Section 25(1) of the Interpretation Act applies therefore to her think as a non-immigrant in Canada, since the time limited for her departure from Canada fell on a Sunday, a holiday, she could have

l'article 19 (1)(e)(vi) de la Loi, et il ne s'agit plus d'un acte ou d'une décision personnelle du fonctionnaire en question. Par conséquent, l'article 25 (1) de la Loi d'interprétation s'applique.

La Loi d'interprétation, dans sa définition de "jour férié", ne fait aucune exception quant aux bureaux, ministères, institutions ou autres organismes qui peuvent de fait être ouverts ou accessibles au public ou exercer leurs fonctions au cours de l'un ou l'autre des jours mentionnés dans cette définition. Le fait que le bureau de l'immigration puisse avoir été ouvert le dimanche 20 octobre 1968 ne peut pas modifier le sens commun des mots de l'article 25 (1) de la Loi d'interprétation: puisque le délai fixé pour "accomplir la chose", à savoir la demande de résidence permanente, s'est terminé un jour férié, le dimanche 20 octobre 1968, "la chose" pouvait être accomplie le premier jour non férié suivant, soit le lundi 21 octobre 1968.

L'article 19 (1)(e)(vi) de la Loi sur l'immigration est pertinent à ce problème. L'article en question est rédigé comme suit:

- "19. (1) Lorsqu'il en a connaissance, le greffier ou secrétaire d'une municipalité au Canada, dans laquelle une personne ci-après décrite réside ou peut se trouver, un fonctionnaire à l'immigration ou un constable ou autre agent de la paix doit envoyer au directeur un rapport écrit, avec des détails complets, concernant
  - (e) toute personne, autre qu'un citoyen canadien ou une personne ayant un domicile canadien, qui
    - (vi) est entrée au Canada comme non-immigrant et y demeure après avoir cessé d'être un nonimmigrant ou d'appartenir à la catégorie particulière dans laquelle elle a été admise en qualité de non-immigrant,"

En vertu de l'article 19(2):

"19(2). Quiconque, sur enquête dûment tenue par un enquêteur spécial, est déclarée une personne décrite au paragraphe (1) devient sujet à l'expulsion:

Quoique cet article ne soit pas invoqué dans l'ordonnance d'expulsion rendue contre M1le Bolante, celle-ci ayant perdu son statut de non-immigrant à minuit le 20 octobre 1969, elle ne pouvait pas subséquemment être considérée comme "requérante se trouvant au Canada" aux termes de l'article 34 de la Partie I du Règlement sur l'immigration.

done that thing, performed that act, on the day next following that was not a holiday, Monday. She was a legal non-immigrant in Canada up to midnight on Monday, October 21, 1968. She could therefore as an applicant in Canada legally apply for permanent residence in Canada any time up to midnight on Monday, October 21, 1968, and she in fact endeavoured to do so, but was refused the necessary forms.

In AC Can v. Hirsch (1960) 24 DLR (2d) 93 a majority of the Ontario Court of Appeal held that a special inquiry held on a Sunday, followed by an order of deportation made the same day, could not be objected to on the grounds that Sunday is a dies non juridicus.

The head-note accurately summarizes the decisions: "the common law rule that no judicial act may be done on a Sunday applied only to judicial acts by a Judge or judicial officer in the performance of his duties in the ordinary course of the administration of justice. It does not apply to administrative tribunals even when they are required to act judicially in the performance of their functions. Hence, it is no objection to a deportation order made by a special inquiry officer after a hearing under the Immigration Act, R.S.C. 1952, c. 325 that the hearing and order were held and made on Sunday. Held, further, the duties of the special inquiry officer may properly be regarded as acts of necessity and hence exempted from the Sunday observance provisions of 5-6 Edw. VI, 1552, c. 3 Moreover, s. 11(k) of the Lord's Day Act. R.S.C. 1952, c. 171 recognizes the grecial importance and necessity of certain work being performed an Sunday by persons engaged in the public service, and this applies to a trocial inquiry officer, especially when he is directed by s. 24(2) of the Immigration Act to hold an immediate inquiry. Awkward and veratious consequences would ensue if he could not exercise his

This case, of course, decides quite a different issue from that now under discussion in the instant appeal. In A.G. v. Hirsch reference is made to the (former) Interpretation Act.

I have been unable to find any jurisprudence, Canadian, English or American on the point at issue. However, following the plain wording of the Interpretation Act, S. 25(1), it must be held that where an Immigration officer authorizes a period of temporary stay for a person admitted to Canada, and that period expires on a holiday as defined in that Act, the person concerned retains the status under which they were admitted until midnight of the day next following that is not a holiday.

When Miss Bolante attended at the Immigration office on Monday, October 21, 1969, she was a legal non-immigrant in Canada and eligible to apply for permanent residence pursuant to section 34. She did not apply because the necessary forms 'prescribed by the Minister' were refused to her. Since the only way she could

Examinons une fois de plus le libellé de l'article 25(1) de la Loi d'interprétation:

"Si le délai fixé pour l'accomplissement d'une chose expire ou tombe un jour férié,  $\frac{1a \ chose}{(1e \ soulignement \ est \ de \ l'auteur)}$ .

Une personne admise à titre de non-immigrant pour une période de temps donnée qui, comme on l'a déjà dit, constitue un délai légal une fois fixée la date d'expiration, doit, en vertu des implications et des dispositions mêmes de la loi, "accomplir une chose" au cours de cette période de temps. L'appelante aurait pu y accomplir l'une ou l'autre de deux choses, dans le délai fixé".

- 1) quitter le Canada, ou
- 2) demander la résidence permanente en tant que requérante se trouvant au Canada.

L'article 25(1) de la Loi d'interprétation s'applique par conséquent à son statut de non-immigrant au Canada; puisque l'échéance du délai fixé pour son départ du Canada tombait un dimanche, jour férié, elle aurait pu accomplir cette chose, exécuter cet acte, le premier jour non-férié suivant, soit le lundi. Elle avait le statut juridique de non-immigrant jusqu'à minuit le 21 octobre 1968. Elle pouvait donc demander la résidence permanente au Canada à quelque moment jusqu'à minuit le lundi 21 octobre 1968. C'est ce qu'elle a tenté de faire, mais on lui a refusé les formules nécessaires.

Dans l'affaire AG Can v. Hirsch (1960) 24 DLR (2d) 93, un jugement majoritaire de la Cour d'appel de l'Ontario a maintenu que le fait que le dimanche soit <u>dies non juridicus</u> ne constitue pas une objection suffisante à la tenue d'une enquête le dimanche qui a donné lieu à une ordonnance d'expulsion le même jour.

Le résumé de la décision est assez clair: "The common law rule that no judicial act may be done on a Sunday applied only to judicial acts by a Judge or judicial officer in the performance of his duties in the ordinary course of the administration of justice. It does not apply to administrative tribunals even when they are required to act judicially in the performance of their functions. Hence, it is no objection to a deportation order made by a special inquiry officer after a hearing under the Immigration Act, R.S.C. 1952, c. 325 that the hearing and order were held and made on a Sunday. Held, further, the duties of the special inquiry officer may properly be regarded as acts of necessity and hence exempted from the Sunday observance provisions of 5-6 Edw. VI, 1552, c. 3 Moreover, s. 11(k) of the Lord's Day Act, R.S.C. 1952, c. 171 recognizes the special importance and necessity of certain work

obtain these forms was from officials of the Department of Immigration, and the refusal to provide these forms was improper, section 34(d) of the Immigration Regulations cannot be invoked as a ground of deportation and this part of the order of deportation, namely paragraph 3(c) thereof is bad and contrary to law.

There remains the final ground for deportation, that set out in paragraph 3(d) of the order:

"(d) paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you took employment in Canada without the written approval of an officer of the Department".

This ground was not included in the section 23 report filed at the commencement of the inquiry. However, the evidence adduced at the inquiry clearly supports it: (page 17, Minutes of Inquiry):

- "Q. Since your arrival in Canada, have you taken employment?
- A. Yes.
- Q. Where do you work?
- A. At present I am working in a factory.
- Q. What is the name of the factory?
- A. J. & A. Aziz.
- Q. What is their address?
- A. 100 Orfus Road.
- Q. When did you stard to work there?
- A. The sixth of December.
- Q. Is that in 1963?
  - L. Yes.

#### And at page 18:

- "Q. You are still working with this company?
- Q. What is your salary?
- 4. \$45. a week.
- Q. Did you ever receive written permission form an Immigration Officer to take employment in Canada?
- A. No sir but I was forced to work because I had no more money."

being performed on Sunday by persons engaged in the public service, and this applies to a special inquiry officer, especially when he is directed by s. 24(2) of the Immigration Act to hold an immediate inquiry. Awkward and vexatious consequences would ensue if he could not exercise his powers on a Sunday."

Bien entendu, cet arrêt décide d'une question bien différente de celle qui nous préoccupe dans le présent appel. Le jugement de A.G. v. Hirsch ne fait pas mention de la Loi d'interprétation telle qu'elle s'appliquait à l'époque.

Je n'ai pu trouver aucune jurisprudence, canadienne, anglaise ou américaine, sur la question qui nous intéresse. Il est cependant clair, à la lecture des termes de la Loi d'interprétation, article 25(1), que lorsque un fonctionnaire à l'immigration autorise une période de séjour temporaire pour une personne admise au Canada et que cette période se termine un jour férié selon la définition qu'en donne la loi, la personne en question conserve le statut en vertu duquel elle a été admise jusqu'à minuit du premier jour non-férié suivant.

Lorsque Mlle Bolante s'est présentée au bureau de l'immigration le lundi 21 octobre 1968, elle avait juridiquement le statut de non-immigrant au Canada et elle pouvait demander la résidence permanente en vertu de l'article 34. Elle n'a pas pu formuler sa demande parce qu'on lui a refusé les formules nécessaires "prescrites par le Ministre". Puisqu'elle ne pouvait obtenir ces formules que par les fonctionnaires du ministère de l'Immigration et que leur refus de les lui procurer était inadmissible, l'article 34 (d) du Règlement sur l'immigration ne peut être invoqué comme motif d'expulsion, soit l'alinéa 3(c), est par conséquent mal fondé et contraire à la loi.

Il reste le dernier motif d'expulsion, qui est exposé à l'alinéa 3(d) de l'ordonnance:

"(d) paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that you took employment in Canada without the written approval of an officer of the Department".

Ce motif n'était pas inclus dans le rapport prévu par l'article 23 déposé au début de l'enquête. Cependant, la preuve apportée à l'enquête le confirme clairement (procès-verbal de l'enquête, page 17):

''Q. Since your arrival in Canada, have you taken employment? A. Yes.

After a few questions the Special Inquiry Officer stated:

"Miss Bolante, you have indicated that you have taken employment in Canada without the written permission of an Immigration Officer, and I put you on notice that I will take this into consideration when considering the evidence and rendering my decision..."

The Special Inquiry Officer acted in accordance with the dictates of natural justice in warning Miss Bolante that he would consider this evidence in reaching his decision and since the evidence clearly supports it, this ground of the deportation order is in accordance with the law.

Since the appellant failed to meet one of the conditions set out in section 34(3) the "waiver provision" in that subsection in respect of the visa requirement in section 28(1) does not apply. Paragraphs 3(a), 3(b) and 3(d) of the order are in accordance with the law and the appeal must be dismissed.

Turning to the Board's jurisdiction pursuant to section 15(1)(b)(i) and (ii) of the Immigration Appeal Board Act, there appear to be no grounds for special relief in this case. Miss Bolante has relatives or close ties in Canada. There was no evidence that the would suffer unusual hardship or would be punished for activities a political character if returned to her homeland. Her family in the Philippines.

The Board therefore orders that the deportation order made against her on March 11, 1969, be executed as soon as practicable.

Dated at Ottawa, this 2nd day of December 1969.

Concurred in by: Gérard Legaré and J.A. Byrne.

For the appellant: D.M. DeMonte, Barrister and Solicitor;

For the respondent: J. Pasman, Esq.

- Q. Where do you work?
- A. At present I am working in a factory.
- Q. What is the name of the factory?
- A. J. & A. Aziz.
- Q. What is their address?
- A. 100 Orfus Road.
- Q. When did you start to work there?
- A. The sixth of December.
- Q. Is that in 1968?
- A. Yes."

### Et à la page 18:

- ''Q. You are still working with this company?
- A. Yes.
- Q. What is your salary?
- A. \$45. a week.
- Q. Did you ever receive written permission from an Immigration Officer to take employment in Canada?
- A. No sir but I was forced to work because I had no more money."

Après quelques questions, l'enquêteur spécial a déclaré:

"Miss Bolante, you have indicated that you have taken employment in Canada without the written permission of an Immigration Officer, and I put on notice that I will take this into consideration when considering the evidence and rendering my decision..."

L'enquêteur spécial s'inspirait de principes de justice naturelle lorsqu'il a prévenu Mlle Bolante qu'il aurait à tenir compte de ce témoignage dans sa décision, et ce motif de l'ordonnance d'expulsion, clairement fondé sur la preuve, est conforme à la loi.

Puisque l'appelante n'a pas réussi à satisfaire à l'une des conditions énumérées à l'article 34(3), la disposition de ce paragraphe annulant les exigences de l'article 28(1) relativement aux visas ne s'applique pas. Les alinéas 3(a), 3(b) et 3(c) de l'ordonnance sont donc conformes à la loi et l'appel doit être rejeté.

En ce qui concerne les pouvoirs attribués à la Commission en vertu de l'article 15(1)(b)(i) et (ii) de la Loi sur la Commission d'appel de l'immigration, rien ne semble justifier l'octroi d'un redressement spécial dans la présente affaire. Mlle Bolante n'a ni parents ni liens intimes au Canada. Rien ne laisse croire qu'elle serait soumise à de graves tribulations ou qu'elle serait punie pour des activités à caractère politique si elle retournait dans son pays. Sa famille demeure aux Philippines.

La Commission ordonne par conséquent que l'ordonnance d'expulsion rendue contre elle le 11 mars 1969 soit exécutée le plus tôt possible.

Fait à Ottawa, le 2 décembre 1969.

Ont souscrit Gérard Legaré et J.A. Byrne.

Pour l'appelant: Me D.M. DeMonte; Pour l'intimé: M. J. Pasman. 10. Antonio Vieira DOS SANTOS,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 21, 1969; File: 69-1385.

Coram: A.B. Weselak, F. Glogowski, J.A. Byrne.

Inquiry - New ground added - obligation of SIO as to person concerned. Immigration Act: 23; Immigration Regulations: 34(3)(d)(f); Immigration Inquiries Regulations: 5.

Held: The subject of an inquiry must be informed of the allegations against him in such a manner that he knows the nature of such allegations before they can be said to have been included in an order by "due process of law" or after "a full and proper Inquiry" or "in accordance with the Immigration Act and Regulations thereunder."

In the instant case there was no indication by the Special Inquiry Officer to the subject of the Inquiry that grounds under sections 34(3)(e) and/or 34(3)(f) of the Immigration Regulations would be included in the deportation order. The appellant was at no time warned, or put on his defence in respect of these grounds.

The judgment of the Board was delivered by:

in. Tessiok:

This is an appeal from a Deportation Order dated March 18, 1959, made by Special Inquiry Officer C.L. Somers at the Immigration Office, Toronto, Ontario, in respect of the appellant, Antonio Vieira DOS SANTOS, in the following terms:

"(1) you are not a Canadian citizen;

(2) you are not a person having Canadian Jonicile, and that:

(3) you are a member of the prohibited class of persons described in paragraph (t) of Section 5 of the Immigration Act as you cannot or do not fulfil or comply with the conditions or requirements of the Immigration Act cr the Regulations in that:

(a) you are not in possession of a valid and subsisting immigrant visa issued to you in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1 and you are not eligible for admission to Canada for permanent

10. Antonio Vieira DOS SANTOS.

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 21 novembre 1969; Dossier: 69-1385.

Coram: A.B. Weselak, F. Glogowski, J.A. Byrne.

Enquête - nouveaux motifs ajoutés - obligation de l'enquêteur spécial à l'égard de la personne intéressée. -Loi sur l'immigration: 23; Règlement sur l'immigration 34(3)(d)(f); Règlement sur les enquêtes de l'immigration: 5.

Arrêt: La personne qui fait l'objet d'une enquête doit être informée des allégations portées contre elle afin d'en connaître la nature; pour "une application régulière de la loi" l'information doit être donnée soit avant qu'on puisse dire que les allégations aient été introduites dans l'ordonnance, soit après une "enquête complète et régulière", ou bien "selon la Loi sur l'immigration et du Règlement".

Dans cette instance rien n'indique que l'enquêteur spécial a informé la personne, objet de l'enquête, que les motifs fondés sur les articles 34(3)(e) et (ou) 34(3)(f) du Règlement sur l'immigration seraient inclus dans l'ordonnance d'expulsion; quant à ces motifs l'appelant n'a à aucun moment été prévenu ni mis en garde.

Le jugement de la Commission fut rendu par:

#### A.B. Weselak:

Appel d'une ordonnance d'expulsion rendue le 18 mars 1969 par l'enquêteur spécial C.L. Somers dans le bureau de l'immigration à Toronto, Ontario, contre l'appelant, Antonio Vieira DOS SANTOS. L'ordonnance dit:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile, and that:
- (3) you are a member of the prohibited class of persons described in paragraph (t) of Section 5 of the Immigration Act as you cannot or do not fulfil or comply with the conditions or requirements of the Immigration Act or the Regulations in that:

residence without said visa due to your inability to comply with the conditions of paragraphs (d), (e), and (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1, amended, in that you did not make your application for permanent admission to Canada before the expiration of the period of temporary stay in Canada authorized for you by an Immigration officer, you have taken employment in Canada without the written approval of an officer of the Department, and in my opinion you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment;

(b) your passport does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1."

The appellant was not present at the hearing but was represented by his counsel Mr. Colin Campbell, Barrister. The respondent was represented by Mr. W. Bernhardt.

The appellant was born on July 5, 1948 in Portugal. He completed four successful years in school, worked on the farm for five years then went to Trance where he was employed as a welder in ornamental iron work for two and a half years. He applied for an immigrant visa sometime in 10 m while in France but this application was refused. He entered Canada on June 27, 1968 and was granted entry under Section 7(1)(c) of the Immigration Act to July 11th, 1968. He filed Imm. form 1008 on July 12th, 1968 but this application was refused on September 3, 1968.

The Section 23 report dated 10 October 1968 cites as grounds for deportation Section 5(t) of the Immigration Act coupled with Sections 34(3)(d), 28(1) and 29(1) of the Immigration Regulations. The Deportation order made by the Special Inquiry Officer at the close of the Inquiry cites Section 5(t) of the Act coupled with 34(3)(d), 34(3)(e), 34(3)(f), 28(1) and 29(1) of the Immigration Regulations.

is to the inclusion in the order of grounds not found in the faction 23 report in the case of Inez Matilda HAUGHTON and the Minister of Manager and Immigration (unreported) file 69-209, the Board stated:

"The Section 23 report while it requires a proper examination of the person concerned in a preliminary way, it does not require a full investigation of the person concerned. As a result when the officer finds any ground which will support his opinion he (a) you are not in possession of a valid and subsisting immigrant visa issued to you in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations, Part 1 and you are not eligible for admission to Canada for permanent residence without said visa due to you inability to comply with the conditions of paragraphs (d), (e), and (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1, amended, in that you did not make your application for permanent admission to Canada before the expiration of the period of temporary stay in Canada authorized for you by an Immigration officer, you have taken employment in Canada without the written approval of an officer of the Department, and in my opinion you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment;

(b) your passport does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1."

L'appelant n'était pas présent à l'audition mais était représenté par son conseiller M. Colin Campbell, avocat. M. W. Bernahardt occupait pour l'intimé.

L'appelant est né le 5 juillet 1948 au Portugal. Pendant quatre années il est allé à l'école; il a travaillé cinq ans dans une ferme puis il est allé en France où il a été employé deux ans comme soudeur en ferronerie d'art. Vers 1967, toujours en France, il a demandé un visa d'immigrant mais sa demande a été rejetée. Le 27 juin 1968 il est arrivé au Canada; le droit d'entrée qui s'achevait le 11 juillet 1968 lui a été accordé selon l'article 7(1)(c) de la Loi sur l'immigration. Il a rempli le formulaire Imm. form 1008 le 12 juillet 1968, mais le 3 septembre 1968 la demande était rejetée.

Le rapport prévu à l'article 23, daté du 10 octobre 1968, invoque comme motifs d'expulsion la non conformité avec l'article 5(t) de la Loi sur l'immigration joint aux articles 34(3)(d), 34(3)(e), 34(3)(f), 28(1) et 29(1) du Règlement sur l'immigration. L'article 5(t) de la Loi joint aux articles 34(3)(d), 34(3)(e), 34(3)(f), 28(1) et 29(1) du Règlement sur l'immigration sont cités par l'enquêteur spécial dans l'ordonnance d'expulsion rendue au terme de l'enquête.

has sufficient cause to detain the person and report him to a Special Inquiry Officer. The Special Inquiry Officer then has jurisdiction to conduct the inquiry but under Section 28 of the Section 28 of the Immigration Act he is required at the conclusion of the Inquiry to determine on all the evidence received by him whether

(a) the person may come into or remain in Canada as of right;

(b) whether he is a member of a prohibited class;

(c) whether he has been proven to be a person described in paragraphs (a), (b), (c), (d) or (e) of subsection 1 of Section 19.

Depending upon his findings on evidence he is required under this section to either admit the person or issue an order of deportation into which he must translate all his finds.

The Board finds that the wording of Section 28 does not restrict the finds of the Special Inquiry Officer to the grounds set out in the Section 23 report but extend the power of the Special Inquiry Officer to include other grounds proven by evidence.

In doing so the Special Inquiry Officer should properly warn the person of his intention to do so and grant an adjournment if necessary to enable the person to meet this new allegation. This was done in this case and the Board finds that under the Act the Special Inquiry Officer may, with proper notice to the appellant, include in the order grounds not specified in the Section 23 report."

 $3.\mbox{\ensuremath{\Lambda}}\mbox{\ensuremath{\Lambda}}$  de Smith in his book Judicial Review of Administrative faction at Page 101 states:

"Inclish law recognises but two principles of natural justice: that an adjudicator be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem). There is no standard of substantive natural justice to which judgments must conform."

and at Page 109:

Where the giving of prior notice of impending action or proceedings is required by statute or by the rules of a voluntary association, failure to serve notice on the party immediately affected will enable him successfully to impugn the validity of the proceedings unless, perhaps, he has suffered no detriment or has obstructed or evaded service of notice. The courts may review the adequacy of the notice given. In proceedings of a disciplinary character the nature of the allegations must be clearly specified beforehand so that the party concerned may have

Quant à l'introduction dans l'ordonnance de motifs non établis dans le rapport prévu à l'article 23, comme dans la cause Inez Matilda HAUGHTON c le Ministre de la Main-d'oeuvre et de l'Immigration (non rapportée) dossier no. 69-209, la Commission a déclaré:

"The Section 23 report while it requires a proper examination of the person concerned in a preliminary way, it does not require a full investigation of the person concerned. As a result when the officer finds any ground which will support his opinion he has sufficient cause to detain the person and report him to a Special Inquiry Officer. The Special Inquiry Officer then has jurisdiction to conduct the inquiry but under Section 28 of the Immigration Act he is required at the conclusion of the Inquiry to determine on all the evidence received by him whether

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S.A. de Smith dans son livre"Judicial Review of Administrative Action", déclare à la page 101:

"English law recognises but two principles of natural justice: that an adjudicator be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem). There is no standard of substantive natural justice to which judgments must conform."

a proper opportunity to prepare his defence; but the degree of particularity with which the charges must be set out may vary according to the degree of informality with which the proceedings of a tribunal may be conducted, and even where they are inadequately specified the defect may not be fatal if the "defendant" is not thereby prejudiced - e.g., because he is already conversant with their general nature or because he does not dispute the allegations of fact on which they are founded."

### and at Page 110 and 111:

"A person who is entitled to the protection afforded by the audi alteram partem rule must not only be given an adequate opportunity to know the case he has to meet; he must also be given an adequate opportunity to answer it. But he is not entitled to an oral hearing unless such a hearing is expressly prescribed or unless the context indicates that he would be unable adequately to present his case in writing. In situations where he is held to be entitled to appear in person, there is authority for maintaining that (in the absence of express provision to the contrary) he has a right to be represented by an agent or by counsel, except perhaps before a domestic forum. At the hearing he must be permitted to call his own witnesses and must be afforded such other facilities as are necessary to enable him to present his case properly. Must he also be permitted to cross-examine opposing witnesses? It would seem that although the right to cross-examine is not invariably implicit in administrative adjudication, refusal to permit cross-examination may in some cases be a decisive element in establishing denial of the fair hearing that the rules of natural justice require."

Section 1(a) of the Canadian Bill of Rights provides:

- "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
  - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."

Tarnopolsky in his book "The Canadian Bill of Rights" at  $\ensuremath{\text{Canadian}}$  148 states:

"This clause has a long history dating back to Magna Carta where, in Chapter 39, the following well-known words appeared: "No freeman shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land'."

### et à la page 109:

'Where the giving of prior notice of impending action or proceedings is required by statute or by the rules of a voluntary association, failure to serve notice on the party immidiately affected will enable him successfully to impugn the validity of the proceedings unless, perhaps, he has suffered no detriment or has obstructed or evaded service of notice. The courts may review the adequacy of the notice given. In proceedings of a disciplinary character the nature of the allegations must be clearly specified beforehand so that the party concerned may have a proper opportunity to prepare his defence; but the degree of particularity with which the charges must be set out may vary according to the degree of informality with which the proceedings of a tribunal may be conducted, and even where they are inadequately specified the defect may not be fatal if the "defendant" is not thereby prejudiced - e.g., because he is already conversant with their general nature or because he does not dispute the allegations of fact on which they are founded."

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L'article l(a) de la Déclaration canadienne des droits stipule:

"1. Il est par les présentes reconnu et déclaré que les droits de l'homme et les libertés fondamentales, ci-après énoncés, ont existé et continueront à exister pour tout individu au and at Page 149:

"In its narrowest context, as has been hinted, the phrase means nothing more than that "the right of the individual to life, liberty, security of the person and enjoyment of property" may only be withdrawn "according to existing law". This means, then, that Parliament may pass any law, however unreasonable, to deprive an individual of his "life, liberty, or property". The only restriction or protection which the clause would provide is that an individual could not be deprived of these rights except by a pre-existing law. Any such deprivation would have to be justified in law, although the law need not be just."

#### and at Pages 160 and 161:

"The words "detention" and "imprisonment" seem quite straightforward, but will be discussed more fully later in this chapter.
As to the word "exile", Professor Maxwell Cohen suggested that
there was no such thing as a right to exile in any case,
certainly not be international law. Another country does not
have to accept an exiled person. It is important to note the
distinction between the terms "exile" and "deport". A country
"exiles" its own citizens, presuming such a thing can be done,
but it "deports" aliens. There is apparently no question that
the supreme power in every state has the right to make laws for
the exclusion and expulsion of aliens and to provide machinery
by which these laws can be effectively enforced. The federal
government possesses the power to expel an alien from Canada
or to deport him to the country whence he entered."

Section 2(e) of the Canadian Bill of Rights provides:

- "2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringement of authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shill be construed or applied so as to
  - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

quels que soient sa race, son origine nationale, sa couleur, sa religion ou son sexe:

(a) le droit de l'individu à la vie, à la liberté, à la sécurité de la personne ainsi qu'à la jouissance de ses biens, et le droit de ne s'en voir privé que par l'application régulière de la loi."

Tarnopolsky dans son livre "The Canadian Bill of Rights" à la page 148 déclare:

"This clause has a long history dating back to Magna Carta where, in Chapter 39, the following well-known words appeared: 'No freeman shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land'."

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for the exclusion and expulsion of aliens and to provide
machinery by which these laws can be effectively enforced.
The federal government possesses the power to expel an lien from
Canada or to deport him to the country whence he entered."

L'article 2(e) de la Déclaration canadienne des droits stipule que:

and Tarnopolsky again states at Page 193:

"During the Special Committee hearings on the Bill of Rights there were two main criticisms of this clause. One concerned the word "hearing", while the other concerned the term "fundamental justice". It was suggested that the term "hearing" might imply an oral hearing, which is not always provided. "Fair procedure" or "examination of his case", were suggested as perhaps being better. The Minister of Justice answered this adequately with the statement that a "fair hearing" has clearly been established by past decisions to imply at least knowledge of the allegation against the person, and an opportunity to answer. However, he said, an opportunity to answer does not necessarily mean an oral hearing. Yet, it does involve more than a mere "examination of one's case"."

In conclusion Tarnopolsky states at Page 207:

"Canadian courts in considering s. 2(e) of the Bill of Rights should ensure that all federal administrative tribunals manifest the three basic characteristics recommended by the Franks Committee, i.e., openness, fairness, and impartiality:

In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject-matter of their decisions."

In Samejima v. R. 1932 S.C.R. 640, in referring to the direction under what is now Section 26 of the Immigration Act it was  $\frac{1}{2}$ 

that the facts must be alleged in such a manner that the person concerned will have a reasonable opportunity of the story the nature of the allegations."

Section 11(3) of the Immigration Act provides:

- A Special Inquiry Officer has all the powers and authority of a commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry,
  - (e) do all other things necessary to provide a full and proper inquiry."

- "2. Toute loi du Canada, à moins qu'une loi du parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant "la déclaration canadienne des droits", doit s'interpréter et s'appliquer du manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque, des droits ou libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transmission, et -- en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
  - (e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations."

#### Tarnopolsky déclare à la page 193:

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# Pour conclure, Tarmopolsky à la page 207 déclare:

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Dans la cause Samejima c. R. 1932 S.C.R. 640 au sujet de l'ordre selon ce qui est à présent l'article 26 de la Loi sur l'immigration, on a soutenu:

The Immigration Inquiries Regulations provide for other safeguards such as the subject being informed of his right to counsel and an interpreter.

Sections 5 to 11 inclusive also contain further safeguards to ensure a fair hearing and a full and proper Inquiry. These sections provide:

- "5. Where an Immigration officer has caused a person seeking to come into Canada to be detained and has reported him to a Special Inquiry Officer pursuant to section 23 of the Act, the report so made shall be in writing and shall set out the provisions of the Act or the Immigration Regulations by reason of which the Immigration officer is of the opinion that the person should not be granted admission or allowed to come into Canada."
- "6. Where upon receipt of a report in respect of a person pursuant to section 19 of the Act, the Director causes an inquiry to be held concerning the person pursuant to section 26 of the Act, the direction causing the inquiry shall be in writing and shall set out the provisions of the Act or the Immigration Regulations that have occasioned the Director to cause an inquiry to be held."
- - (a) the written report referred to in section 5 made in respect of the person; or
  - (b) the direction referred to in section 6 causing the inquiry to be held; shall be filed as an exhibit."
- '8. At the commencement of an inquiry the presiding officer
  - (a) read the report or the direction referred to in section 7 where applicable; and
  - (b) inform the person being examined that the purpose of the hearing is to determine whether he is a person who may be admitted, allowed to come into Canada or to remain in Canada, as the case may be, and that in the event a decision is made at the inquiry that he is not such a person, an order shall be made for his deportation from Canada."
- The presiding officer may, from time to time, adjourn the inquiry

"that the facts must be alleged in such a manner that the person concerned will have a reasonable opportunity of knowing the nature of the allegations."

L'article 11(3) de la Loi sur l'immigration stipule que:

- "11(3) Un enquêteur spécial possède tous les pouvoirs et toute autorité d'un commissaire nommé en vertu de la Partie I de la Loi sur les enquêtes et, sans restreindre la généralité de ce qui précède, peut, aux fins d'une enquête,
  - (e) accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière."

Le Règlement sur les enquêtes de l'immigration prescrit entre autres mesures protectives que: on doit informer la personne de son droit de retenir les services d'un avocat ou autre conseiller et celui d'obtenir l'aide d'un interprète.

Les articles de 5 à 11 inclusivement contiennent aussi des dispositions protectives supplémentaires afin d'assurer une audition impartiale et une enquête complète et régulière. Ces articles stipulent que:

- "5. Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada, ni autorisée à y venir.
- "6. Lorsque le Directeur au reçu d'un rapport concernant une personne fait selon l'article 19 de la Loi, décide de faire tenir une enquête au sujet de ladite personne, conformément à l'article 26 de la Loi, l'ordre de tenir l'enquête doit être donné par écrit et doit faire mention des dispositions de la Loi ou du Règlement sur l'immigration aux termes desquelles le Directeur a jugé bon d'ordonner la tenue d'une enquête.
- "7. Au début d'une enquête concernant une personne, il faut, s'il y a lieu, déposer comme pièce à l'appui
  - (a) le rapport écrit mentionné à l'article 5, rédigé à l'égard de ladite personne, ou

- (a) at the request of the person in respect of whom the inquiry is being held, or his counsel; or
- (b) for any other reason the presiding officer deems sufficient."
- "10. A full written report shall be made of the evidence at the inquiry and shall be signed by the presiding officer."
- "11. No person shall, pursuant to subsection (1) of section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an Immigration officer that he should not be so included."

Also Section 23 provides for a preliminary examination and report in writing as provided in Section 5 of the Immigration Inquiries Regulations.

Considering the authorities hereinbefore cited and upon a consideration of the Immigration Act and Regulations thereunder, the Board comes to the irresistible conclusion that the subject of the Inquiry be informed of the allegations in such a manner that he knows the nature of such allegations before they can be said to have been included in an order by "due process of law" or after "a full and proper Inquiry" or "in accordance with the Immigration Act and Regulations thereunder".

Reference is also made to the decision of the Supreme Court of Canada and reasoning in the appeal of Smaro Moshos (unreported) where in considering Section 11 of the Immigration Inquiries Regulations it is stated:

"However, at no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity."

The appeal in that case was allowed for this reason

In the instant case there was no indication by the Special Inquiry Officer to the subject of the Inquiry that grounds under Sections 34(3)(e) and/or 34(3)(f) of the Immigration Regulations would be included in the deportation order. The appellant was at no time warned, or put on his defence in respect of these grounds; a reading of the Act and the Immigration Inquiries Regulations would lead one to believe that the appellant must be informed of the allegations against him in order that he be put on his guard and thus may put in an answer if he so wishes. In this case there was no such warning and as a result the appellant's mind was not directed to a

- (b) l'ordre mentionné à l'article 6 ordonnant la tenue de l'enquête.
- "8. Au début de l'enquête, le président de l'enquête doit
  - (a) lire le rapport ou l'ordre mentionnés à l'article 7, s'il y a lieu, et
  - (b) informer la personne examinée que le but de l'audience est de déterminer si elle est une personne qui peut être admise, autorisée à venir au Canada, ou à rester au Canada, selon le cas, et que si l'on décide à l'enquête que tel n'est pas son cas, une ordonnance d'expulsion du Canada sera rendue contre elle.
- "9. Le président de l'enquête peut, de temps à autre, lever la séance
  - (a) à la demande de la personne faisant l'objet de l'enquête, ou de son avocat ou conseiller, ou
  - (b) pour toute autre raison que le président de l'enquête jugera suffisante.
- "10. Les témoignages déposés à l'enquête doivent être consignés par écrit dans un rapport complet signé par le président de l'enquête.
- "11. Nulle personne ne sera incluse dans une ordonnance d'expulsion, conformément au paragraphe (1) de l'article 37 de la Loi, sans avoir eu d'abord l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas y être incluse.

L'article 23 prescrit aussi un examen préliminaire et un rapport écrit comme le stipule l'article 5 du Règlement sur les enquêtes de l'immigration.

La Commission s'appuie sur les autorités ci-dessus et sur la Loi sur l'immigration et le Règlement et arrive à la conclusion inéluctable que la personne qui fait l'objet de l'enquête doit être informée des allégations afin qu'elle connaisse la nature de cellesci. Pour "une application régulière de la loi" l'information doit être donnée soit avant qu'on puisse dire que les allégations aient été introduites dans l'ordonnance, soit après une "enquête complète et régulière", ou bien "selon la Loi de l'immigration et du Règlement".

La Commission a aussi pris en référence la décision de la Cour Suprême du Canada dans les raisons du jugement dans l'appel de Smaro Moshos (non rapportée) et a considéré l'article ll du Règlement sur les enquêtes de l'immigration et a déclaré:

possible answer to these grounds in the order. For these reasons alone the Board finds that these grounds in the order were not made in accordance with the Immigration Act and Regulations as there could not have been a full and proper Inquiry under the circumstances thereunder.

In addition to the foregoing, the only evidence of employment is to be found on Pages 11 and 12 of the Minutes of Inquiry as follows:

- "Q. Where did you work after you came to Canada?
- A. Advance Fitting.
- Q. Isn't that a lumber company?
- A. They make commercial painting advertising in wood.
- Q. What kind of work were you doing there?
- A. I made signboards for advertising and wrote and painted the names on it.
- Q. Was this a real estate Company?
- A. No, it was just a small manufacturer that makes these signs and distributes them -- some in French, some in English.
- Q. When did you start to work there?
- A. I only worked there for a period of two weeks.
- Q. When did you start to work?
- A. Approximately a month and a half ago I started to work there, and I worked for two weeks.
- Q. When did you terminate your employment there?
- A. About a month ago. Two weeks after I started. I left there after 2 weeks.
- Q. Have you worked anywhere else?
- A. No, I haven't worked any place else."

This evidence is far from satisfactory to prove employment. There is no evidence of a contract of employment; there is no evidence of consideration or remuneration of any kind. Was this employment within the meaning of the Act? This the evidence does not disclose.

The only evidence produced which could relate to the ground in the order based on Section 34(3)(f) of the Immigration Regulations is to be found on Page 7 of the Minutes of Inquiry which reads as follows:

- 'Q. Mr. Dos Santos did you ever make an application for permanent admission to Canada before you came to Canada?
- A. Yes, I did.

"However, at no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity."

Dans cette cause l'appel a été accueilli pour cette raison.

Dans cette instance rien n'indique que l'enquêteur spécial n'a informé la personne, objet de l'enquête, que les motifs fondés sur les articles 34(3)(3) et/ou 34(3)(f) du Règlement sur l'immigration seraient inclus dans l'ordonnance d'expulsion. Quant à ces motifs, l'appelant, a aucun moment n'a été prévenu ni mis en garde; la lecture de la Loi et du Règlement sur les enquêtes amènerait à croire que l'appelant doit être informé des allégations portées contre lui afin qu'il soit prévenu de l'existence de celles-ci et qu'il puisse ainsi répondre s'il le désire. Dans cette cause un tel avertissement n'a pas été donné et en conséquence l'appelant n'a pas concentré toute son attention sur une réponse possible aux motifs de l'ordonnance. Pour ces raisons, en tant que telles, dans les circonstances présentes, la Commission déclare que l'enquête n'a pu être complète et régulière; ainsi les motifs de l'ordonnance ne sont pas en conformité avec la Loi sur l'immigration et le Règlement.

Par ailleurs, la seule preuve relative à l'emploi de l'appelant est aux pages 11-12 du procès-verbal de l'enquête qui disent:

- 'Q. Where did you work after you came to Canada?
- A. Advance Fitting.
- Q. Isn't that a lumber company?
- A. They make commercial painting advertising in wood.
- Q. What kind of work were you doing there?
- A. I made signboards for advertising and wrote and painted the names on it.
- Q. Was this a real estate Company?
- A. No, it was just a small manufacturer that makes these signs and distributes them -- some in French, some in English.
- Q. When did you start to work?
- A. Approximately a month and a half ago I started to work there, and I worked for two weeks.
- Q. When did you terminate your employment there?
- A. About a month ago. Two weeks after I started. I left there after 2 weeks.

- Q. Where was that?
- A. In Paris, France.
- Q. When did you make that application?
- A. I can't recall the exact date, but it was between 1967 and 1968.
- Q. Don't you know what time of year it was?
- A. No exactly. It was either at the end of 1967 or the beginning of 1968.
- Q. What was the outcome of that application?
- A. I received a letter similar to this.

(Person concerned produces original letter dated September 3, 1968, from the District Admissions Supervisor of the Immigration Division at Toronto, advising him that his application had been refused.)

Copy of letter dated September 3 from the District Admissions Supervisor of the Immigration Division at Toronto filed as Exhibit 'C'.

- O. When your application was refused by the Paris office, did they advise you that you couldn't comply with the requirements?
- A. I don't recall exactly the reasons, but one of the major reasons was because I couldn't speak the language. I couldn't speak English. And maybe because I didn't have any members of my family residing here in Canada."

There is nothing here to indicate that he failed to meet the norms of assessment. As a result the Board finds no evidence in appart of the ground in the order based on Section 34(3)(f) of the limitation Regulations.

The ground in the order based on Section 34(3)(d) of the Immigration Regulations is valid; the appellant's non-immigrant status erriced July 11th, 1968. He filed his formal application on July 17th. 1971. One day after his status had expired.

The appellant admits he is not a Canadian citizen and that a the continuous Canadian dericile. He also admits that he is not in possession of an immigrant visa or of a medical certificate in the prescribed form.

Having found these grounds in the order valid and made in accordance with the Immigration Act and Regulations the Board dismisses the appeal under Section 14 of the Immigration Act (see Mannira, in 111 at & Rodrigues vs. Queen).

- Q. Have you worked anywhere else?
- A. No, I haven't worked any place else."

Cette preuve est loin d'être satisfaisante pour prouver que l'appelant a accepté un emploi. Il ne s'y trouve ni preuve de contrat de travail, ni clause ou mention, de rémunération d'aucune sorte. Etait-ce un emploi au yeux de la Loi? La preuve ne révèle rien à ce sujet.

La seule preuve administrée qui pourrait soutenir le motif de l'ordonnance fondé sur l'article 34(3)(f) du Règlement sur l'immigration se trouve à la page 7 du procès-verbal de l'enquête:

- "Q. Mr. dos Santos did you ever make an application for permanent admission to Canada before you came to Canada?
- A. Yes, I did.
- Q. Where was that?
- A. In Paris, France.
- Q. When did you make that application?
- A. I can't recall the exact date, but it was between 1967 and 68.
- Q. Don't you know what time of year it was?
- A. No exactly. It was either at the end of 1967 or the beginning of 1968.
- Q. What was the outcome of that application?
- A. I received a letter similar to this.

(La personne intéressée présente la lettre originale datée du 3 septembre 1968 du surveillant de district de l'admission, Division de l'immigration à Toronto. La lettre l'avertit du rejet de sa demande.)

Une copie de la lettre datée du 3 septembre 1968 du surveillant de district de l'admission Division de l'immigration à Toronto est versé au dossier comme pièce à l'appui 'C'.

- Q. When you application was refused by the Paris office, did they advise you that you couldn't comply with the requirements?
- A. I don't recall exactly the reasons, but one of the major reasons was because I couldn't speak the language. I couldn't speak English. And maybe because I didn't have any members of my family residing here in Canada."

As to the exercise of the Board's discretion, under the evidence relating to the ground in the order based on Section 34(3)(d) of the Immigration Regulations is to be found on Page 5 of the Minutes of Inquiry the following:

"Q. Did you submit an application for permanent admission to Canada on the 12 July 1968 at Toronto?

A. Yes.

Copy of Immigration form 1008, No. C 034748, entered as Exhibit 'B'.

- Q. Mr. dos Santos, before you made your application for permanent residence, did you at any time in Canada make application for extension of your temporary status?
- A. No, I did not.
- Q. What was the reason you did not make your application before the time expired for which you were granted temporary admission?
- A. I came to the Immigration Office here at 480 University Avenue, and they told me that I couldn't make application, that I had to go back to New York.
- Q. The question was, why did you not apply before your temporary entry permit expired?
- A. I came here two days before my permit would expire, and they told me that I had to go back to New York.
- Q. Do you mean that you wanted to apply for an extension of your temporary entry, and they refused to grant it?
- A. That is correct. They told me I would have to go back to New York.
- Q. When did you decide that you wanted to remain permanently in Canada?
- A. It was that day when I was here -- two days before the 11th.

By Special Inquiry Officer to Interpreter:

After that answer, I don't know if you understood the question. The question was when did you make the dicision you wanted to stay permanently.

By Person concerned:

 $^{\circ}$  came to the Immigration Office and told them that I was here in Canada as a tourist and my time would be expired in two days, and then I asked the officer if it was possible for him to get the

Rien n'indique ici qu'il n'a pas satisfait aux exigences des normes d'évaluation. En conséquence, la Commission déclare que dans l'ordonnance il y a absence de preuve à l'appui du motif fondé sur l'article 34(3)(f) du Règlement sur l'immigration.

Dans l'ordonnance le motif fondé sur l'article 34(3)(e) du Règlement sur l'immigration est valide; le statut de non-immigrant de l'appelant prenait fin le 11 juillet 1968, et le 12 juillet 1968, un jour après l'expiration de son statut, il a déposé sa demande en bonne et due forme.

L'appelant admet ne pas être citoyen canadien et ne pas avoir acquis de domicile canadien; il admet aussi ne pas être en possession d'un visa d'immigrant ou d'un certificat médical en la forme prescrite.

La Commission, ayant trouvé dans l'ordonnance ces motifs valides et établis en conformité avec la Loi sur l'immigration et le Règlement, rejette l'appel sous le régime de la Loi sur l'immigration article 14 (voir Mannira, Espaillat Rodrigues c. Queen).

La page 5 du procès-verbal de l'enquête a trait à l'exercice de la discrétion de la Commission, sur la preuve relative au motif de l'ordonnance, fondé sur l'article 34(3)(d) du Règlement sur l'immigration. Cette page dit:

- "Q. Did you submit an application for permanent admission to Canada on the 12 July 1968 at Toronto?
- A. Yes.

Copie du formulaire 1008 de l'immigration, no. C 034748, versée en pièce à l'appui 'B'.

Q. Mr. dos Santos, before you made your application for permanent residence, did you at any time in Canada make application for extension of your temporary status?

A. I came to the Immigration Office here at 480 University Avenue, and they told me that I couldn't make application, that I had to go back to New York.

Q. The question was, why did you not apply before your temporary entry permit expired?

A. I came here two days before my permit would expire, and they told me that I had to go back to New York.

necessary documents in order for me to remain in Canada permanently. And after he looked at my passport he said 'no, you have to go back to New York'.

By Special Inquiry Officer:

I understood before that when you came in to the Immigration Officer you only asked them about an extension of your temporary permit.

By Person concerned:

Maybe the officer didn't understand what I asked him, but I actually asked him at that time what was necessary for me to stay permanently.

By Special Inquiry Officer:

- Q. And what did he tell you?
- A. He told me it was not possible. I had to go back to New York.
- Q. Do you mean, you asked him about what documents were necessary for you to stay permanently in Canada and he said it wasn't possible, that you must go back to New York?
- A. The officer picked up my passport, looked at it, closed it, and said I had to go back to New York.
- Q. And you didn't ask him why?
- A. I did not."

From the foregoing evidence of the appellant which is uncontradicted it would appear to the Board that the appellant, two days before his status expired, attended at an Immigration office with the intention of filing his application for permanent residence. His intentions were thwarted by the Immigration officer, and through no fault of his own his application was filed after his status had expired. Under the circumstances, while technically the ground is valid, as a matter of natural justice the Board feels it should exercise its discretion in this case on humanitarian grounds and directs that the order br quashed.

Dated at Ottawa, this 21st day of November 1969.

Concurred in by: F. Glogowski and J.A. Byrne.

For the appellant: Colin Campbell, Barrister and Solicitor; For the respondent: W. Bernhardt, Esq.

- Q. Do you mean that you wanted to apply for an extension of your temporary entry, and they refused to grant it?
- A. That is correct. They told me I would have to go back to New York.
- Q. When did you decide that you wanted to remain permanently in Canada?
- A. It was that day when I was here -- two days before the 11th.

By Special Inquiry Officer to Interpreter:

After that answer, I don't know if you understood the question. The question was when did you make the decision you wanted to stay permanently.

#### By Person concerned:

I came to the Immigration Office and told them that I was here in Canada as a tourist and my time would be expired in two days, and then I asked the officer if it was possible for him to get the necessary documents in order for me to remain in Canada permanently. And after he looked at my passport he said 'no, you have to go back to New York'.

## By Special Inquiry Officer:

I understood before that when you came in to the Immigration Office you only asked them about an extension of your temporary permit.

## By Person concerned:

Maybe the officer didn't understand what I asked him, but I actually asked him at that time what was necessary for me to stay permanently.

## By Special Inquiry Officer:

- Q. And what did he tell you?
- A. He told me it was not possible. I had to go back to New York.
- Q. Do you mean, you asked him about what documents were necessary for you to stay permanently in Canada and he said it wasn't possible, that you must go back to New York?
- A. The officer picked up my passport, looked at it, closed it, and said I had to go back to New York.
- Q. And you didn't ask him why?
- A. I did not."

D'après cette déclaration non contredite de M. Santos, il semblerait que l'appelant deux jours avant l'expiration de son statut soit allé au bureau de l'immigration dans l'intention de déposer sa demande de résidence permarente. Le fonctionnaire à l'immigration a fait obstacle à la réalisation de ses intentions et M. Santos bien que n'ayant commis aucune faute a vu sa demande être déposée après l'expiration de son statut. Étant donné les circonstances, bien que techniquement le motif soit valide, la justice naturelle demande à la Commission d'exercer son pouvoir discrétionnaire dans cette cause pour des motifs d'ordre humanitaires; et la Commission ordonne donc de surseoir à l'exécution de l'ordonnance.

Ottawa le 21 novembre 1969.

Ont souscrit: F. Glogowski et J.A. Byrne.

Pour l'appelant: Me Colin Campbell; Pour l'intimé: M. W. Bernhardt. **RESUMES** 

RÉSUMÉS



11.
Ingrid Renate REID,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: January 21, 1969; File: 68-5568.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Domicile - acquisition of - Immigration Act and Citizenship Act compared - Immigration Act: 4(1); Citizenship Act (1952 RSC., c.33); 19(9).

Appellant, a German citizen, married a Canadian serviceman in Germany on April 4, 1963. On July 3, 1963, she was issued a Canadian Immigrant's Record Card bearing the mention "admitted as a landed immigrant", and "Deemed Resident 10(9) Citizenship Act." She came to Canada on September 23, 1964, with her husband, as a "returning resident" as shown on her passport. She was later convicted and sentenced on a charge of keeping a common bawdy house; she was ordered deported on June 25, 1968.

Held: It would seem that for the purposes of the Citizenship Act Mrs. Reid's residence in Canada, fictionally dates back to the date of her marriage, i.e. April 5, 1963. Further, section 10(9) provides that one she was granted her immigrant visa, she is deemed to have been lawfully admitted to Canada for permanent residence - a condition precedent to a successful application for Canadian citizenship. However, this has no relevance to the provisions of section 4(1) of the Immigration Act. The reference to the Citizenship Act can neither add to nor substract from the period required for the acquisition of Canadian domicile, and further, the reference is to section 19(9) of the Citizenship Act, which in turn refers to the granting of an "immigrant visa by a Canadian Immigration Officer"; i.e. the grant of landing pursuant to the Immigration Act and Regulations.

Mrs. Reid's Card is dated July 3, 1963, and she therefore was admitted to Canada as a landed immigrant on that date. It follows that when the order was made on June 25, 1968, she was not a person having Canadian domicile, and since there can be no doubt on the evidence that she was not a Canadian citizen and that she had been convicted of an offense under the Criminal Code, the order is in accordance with the law. Appeal dismissed on law.

For the appellant: Gordon P. Killeen, Barrister and Solicitor; For the respondent: J. Pasman, Esq.

11. Ingrid Renate REID,

appelante,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 21 janvier 1969; Dossier: 68-5568.

Coram: M11e J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Domicile - acquisition de - Comparaison de la Loi sur la citoyenneté et de la Loi sur l'immigration. - Loi sur l'immigration: 4(1); Loi sur la citoyenneté (1952, S.R.C., c. 33): 10(9).

L'appelante, une citoyenne de l'Allemagne, a épousé un soldat canadien en Allemagne le 4 avril 1963. Le 3 juillet 1963 elle a reçu une fiche des registres de l'immigration au Canada portant l'inscription "admitted as a landed immigrant", et "Deemed Resident 10(9) Citizenship Act". Elle est arrivée au Canada le 23 septembre 1964 avec son mari; d'après son passeport, elle avait le statut de "returning resident". Elle a plus tard été condamnée après avoir été trouvée coupable d'une accusation d'avoir tenu une maison de débauche; une ordonnance d'expulsion a été rendue contre elle le 25 juin 1968.

Arrêt: Il apparaît qu'aux fins de la Loi sur la citoyenneté, la résidence de Mme Reid au Canada remonte, selon une fiction, à la date de son mariage, soit au 5 avril 1963. En plus, l'article 10(9) prévoit qu'une fois en possession de son visa d'immigrant elle doit être considérée comme ayant été admise an Canada en vue d'y résider en permanence, ce qui est une condition préalable à l'obtention de la citoyenneté canadienne. Cependant, ce fait n'affecte en rien les dispositions de l'article 4(1) de la Loi sur l'immigration. Le recours à la Loi sur la citoyenneté ne peut prolonger ni racourcir le délai requis pour l'obtention du domicile canadien, et de plus, le recours porte sur l'article 10(9) de la Loi sur la citoyenneté, qui se rapporte à l'octroi "d'un visa d'immigrant par un fonctionnaire à l'immigration du Canada", donc à la réception en vertu de la Loi sur l'immigration et son Règlement.

La fiche de Mme Reid est en date du 3 juillet 1963; elle a par conséquent été admise au Canada comme immigrante reçue à cette date. Il s'ensuit que lorsque l'ordonnance a été reçue, le 25 juin 1968, elle n'était pas une personne ayant un domicile au Canada et, puisqu'il est prouvé sans aucun doute qu'elle n'était pas citoyenne du Canada et qu'elle avait été trouvée coupable d'un délit en vertu du Code pénal, l'ordonnance est conforme à la loi. L'appel est rejeté comme non fondé.

Pour l'appelante: Me Gordon P. Killeen;

Pour l'intimé: M. J. Pasman.

12.
Robert Lawrence ALBRIGHT,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: June 18, 1969; File: 69-98.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, Gérard Legaré.

Section 23 Report - exit and re-entry before - validity - Status - allowed to enter without - effect of lack of examination. - Duplicity of charges. - Immigration Act: 7(1)(2), 19(1)(e)(iii), 19(1)(e)(viii); 50(b).

Appellant, a married 21 year old citizen of the United States, came into Canada four times with the intention of remaining. First, in June 1967 with his wife, he was admitted as a non-immigrant for two weeks but remained four months and took employment, changing his name to Smith, and obtaining Canadian documents. He returned to the U.S.A. around September or October 1967, but was refused reentry to Canada a few days later, only after applying for permanent residence. He reentered Canada in March 1968 by representing himself as a Canadian. He returned to the U.S.A. in October 1968, was picked up as a deserter. He escapted from a stockade and reentered Canada in December 1968 in Saskatchewan after hitch-hiking a ride; he was asked no questions at the border. He was arrested in Ontario and convicted and sentenced under Section 50(b) of the Act, and was ordered deported on January 15, 1969.

Held: Following the Muirhead case, the only relevant "entry" in this case is the last one, namely that at the border point in Saskatchewan, where appellant was not questioned. Lawful admission implies the acquisition of some sort of status in this country, and the only status applicable to the appellant would be that of non-immigrant, since he had no claim to Canadian citizenship or domicile, nor to status as a landed immigrant.

The Immigration officer's failure to question the appellant at the port of entry leaves us without any idea of the category of non-immigrant in which he fell when "admitted". He cannot be designated as a member of any of the classes in section 7(1) or (2), and so does not fall within the definition of "non-immigrant". He was therefore physically in Canada without any status - through no fault of his own - and so cannot be brought within any of the clauses of section 19(1)(e)(vi). He did not enter as a non-immigrant and so cannot have ceased to be one. Therefore, the relevant paragraph of the order is void for duplicity and so not in accordance with fundamental legal principles, and further, even if amended, it is not supported by the evidence.

12.
Robert Lawrence ALBRIGHT,

appelant,

v .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 18 juin 1969; Dossier: 69-98.

Coram: M11e J.V. Scott, président, A.B. Weselak, Gérard Legaré.

Rapport en vertu de l'article 23 - sortie et rentrée avant-validité. - Statut - entrée sans - conséquence de l'absence d'examen - Multiplicité des accusations. - Loi sur l'immigration: 7(1)(2), 19(1)(e) (iii), 19(1)(e) (vi), 19(1)(e) (viii), 50(b).

L'appelant, un citoyen des États-Unis, marié, âgé de 21 ans, est venu au Canada à quatre reprises avec l'intention d'y demeurer. La première fois, en juin 1967, il a été admis avec sa femme comme non-immigrant pour une préiode de deux semaines, mais il est demeuré quatre mois et il a tenu un emploi, ayant changé son nom pour Smith et obtenu des documents canadiens. Il est retourné aux États-Unis au cours du mois de septembre ou octobre 1967, mais on lui a refusé l'entrée au Canada quelques jours plus tard après qu'il eut demandé la résidence permanente. Il revint au Canada une troisième fois en mars 1968, s'étant présenté comme citoyen canadien. Il est retourné aux États-Unis en octobre 1968 et il y a été arrêté comme déserteur. Il s'est évadé de prison et est entré au Canada en décembre 1968, en Saskatchewan, après avoir fait un trajet en auto-stop; on ne l'a pas interrogé à la frontière. Il a été arrêté en Ontario et condamné après avoir été trouvé coupable en vertu de l'article 50(b) de la Loi; une ordonnance d'expulsion a été rendue contre lui le 15 janvier 1969.

Arrêt: Selon l'affaire Muirhead, la seule "entrée" pertinente dans cette affaire est la dernière, soit celle qui a eu lieu au poste-frontière de la Saskatchewan, où le requérant n'a pas été interrogé. L'admission légale comporte l'acquisition d'un statut quelconque au Canada et le seul statut que l'on pourrait reconnaître à l'appelant serait celui de non-immigrant puisqu'il n'a aucun droit à la citoyenneté ni au domicile canadien ni au statut d'immigrant reçu.

Parce que le fonctionnaire à l'immigration n'a pas interrogé l'appelant au port d'entrée nous ne savons pas dans quelle catégorie de non-immigrants il a été classé lorsqu'il a été "admis". Il ne peut être considéré comme membre des catégories de l'article 7(1) et (2) et par conséquent il ne tombe pas sous la définition de non-immigrant. Il était donc au Canada physiquement mais sans statut sans en être responsable - et il ne peut donc pas tomber sous le coup des dispositions de l'article 19(1)(e)(vi). Puisqu'il n'est

Also since appellant was not questioned at the border in Saskatchewan, there can be no suggestion that he "came into" Canada by reason of false or misleading information. And since he was in plain view of the officer he did not come into this country by stealth.

Appellant's Canadian identity papers were in the name of Smith, but there is no evidence that after his "entry" he remained in Canada by reason of this change of name, and his conviction cannot serve as proof of the facts needed to support the relevant paragraph in the order.

But appellant was an inmate of a gaol when the order was made. It seems grotesque that a person can be jailed as a result of conviction for an offense under the Immigration Act, and then ordered deported because he has been so jailed - it seems analogous to double jeopardy, but there can be no doubt about the mandatory wording of section 19(1)(e)(iii). Appeal dismissed on law.

For the appellant: J.W. Austin, Barrister and Solicitor;

For the respondent: F.D. Craddock, Esq.

pas entré comme non-immigrant il ne peut avoir cessé de l'être. L'alinéa pertinent de l'ordonnance est donc nul pour duplication et contraire aux principes fondamentaux du droit et, même modifié, il n'est pas étayé par la preuve.

Puisque l'appelant n'a pas été interrogé à la frontière en Saskatchewan, il n'est certes pas "entré" au Canada en fournissant des renseignements faux ou trompeurs. Et puisqu'il est passé sous les yeux du fonctionnaire, il n'est pas entré au pays clandestinement.

Les papiers d'identité canadiens de l'appelant étaient au nom de Smith, mais rien ne prouve qu'une fois entré il est demeuré au Canada en raison de ce changement de nom et les faits qui justifieraient l'alinéa pertinent de l'ordonnance ne sont pas prouvés par sa condamnation.

Mais l'appelant était détenu dans une prison au moment où fut rendue l'ordonnance. Il paraît absurde que l'on puisse emprisonner une personne trouvée coupable d'une infraction à la Loi sur l'immigration puis de l'expulser parce qu'elle a été emprisonnée; cela ressemble à une double poursuite pour les mêmes faits; mais le libellé impératif de l'article 19(1)(e)(iii) ne laisse aucun doute. L'appel est rejeté comme tel.

Pour l'appelant: Me J.W. Austin; Pour l'intimé: M. F.D. Craddock. 15. Fernando Almeida HENRIQUEZ DUARTE,

applicant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: July 16, 1969; File: 69-541.

Coram: J.C.A. Campbell, Vice-chairman, Gérard Legaré, U. Benedetti.

Jurisdiction - Immigration Appeal Board - appellate - nature of - Immigration Appeal Board Act: 11; Immigration Appeal Board Rules: 4.

Applicant was subject of an Inquiry on September 24, 1968, and an order was issued on the same day. He stated he did not want to appeal. The notice of motion was dated April 9, 1969.

Held: The jurisdiction of the Board to entertain an appeal (except for sponsorship appeals which are dealt with in Section 17 of the Immigration Appeal Board Act) is found in Section 11 of said Act, and in Section 4 of the Rules.

The Board, even though not bound by, agrees with Jordon v. Saskatchewan Securities Commission (1968) 64 W.W.Ŕ. 121. It is of the opinion that the creation of a right of appeal is purely statutory and that an appeal must be brought within the time limit laid down by the Statute or Rules made pursuant to the Statute nor is there any provision or authority whereby the Board can waive its own Rules in respect of the time within which an appeal must be filed (vide the Crowther (69-83) and Proias (68-6057) cases). Motion denied.

For the applicant: Kenneth J. Scherling;

For the respodent: Nil.

13. Fernando Almeida HENRIQUEZ DUARTE,

requérant.

V .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 16 juillet 1969; Dossier: 69-541.

Coram: J.C.A. Campbell, vice-président, Gérard Legaré, U. Benedetti.

Compétence - Commission d'appel de l'immigration - appel - caractère - Lois sur la Commission d'appel de l'immigration: 11; Règles de la Commission d'appel de l'immigration: 4

Le requérant a fait l'objet d'une enquête le 24 septembre 1968 et une ordonnance a été rendue le même jour. Le requérant a déclaré ne pas vouloir interjeter appel. L'avis de requête est en date du 9 avril 1969.

Arrêt: La compétence de la Commission pour connaître d'un appel (à l'exception des appels des répondants, prévus à l'article 17 de la Loi sur la Commission d'appel de l'immigration) se trouve à l'article 11 de ladite Loi et à l'article 4 des Règles.

La Commission est d'accord avec la décision Jordan c. Saskatchewan Securities Commission (1968) 64 W.W.R. 121, même si cette décision ne l'oblige en rien. Elle estime que la création du droit d'appel est purement statutaire et que l'appel doit être interjeté dans le délai prescrit par la loi ou par les autres lois ou règles qui en découlent et qu'aucune disposition n'autorise la Commission à déroger à ses propres Règles quant au délai prescrit pour le dépôt d'un appel (voir les affaires Crowther (69-83) et Proias (68-6057). La requête est refusée.

Pour le requérant: Me Kenneth J. Scherling; Pour l'intimé: aucun. Otis RAULINS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: July 29, 1969; File: 69-142.

Coram: J.C.A. Campbell, Vice-chairman, A.B. Weselak, U. Benedetti.

Examination - nature of. - Inquiry - basis of - section 23 report not signed by examining officer - whether valid - Immigration Act: 20, 23.

Appellant, a thirty-one year old citizen of the U.S.A., separated from his wife and children, entered Canada on June 25, 1967, as a non-immigrant for 2 days. He applied for permanent admission before Mr. Betteridge on July 5, 1968, was examined by Mr. Young, was refused and was asked to leave by July 19, 1968. He did not; a section 23 report was made by Mr. Betteridge; an Inquiry was held; he was ordered deported January 21, 1969.

Held: A careful examination of the above referred to Sections leads the Board to the conclusion that before an Immigration officer is able to form an opinion which results in his making a Section 23 report such officer must carry out a reasonable and proper personal examination of the person concerned. After having carried out such an examination and having arrived at the opinion a Section 23 report must be made, the Immigration officer who conducted the reasonable and proper examination signs the Section 23 report. This report forms the basis of the Inquiry. If some other Immigration officer signs the Section 23 report instead of the Immigration officer who conducted the reasonable and proper examination then, in the Board's opinion, the Inquiry which stems from the Section is a nullity and the Special Inquiry Officer is without jurisdiction.

In the instant appeal the Board finds that it was Mr. Young, not Mr. Betteridge who, in fact, carried out the reasonable and proper examination of the appellant which would form the basis for the opinion required in Section 23. Therefore Mr. Young should have signed the Section 23 report. As. Mr. Betteridge did not make a reasonable and proper examination of Mr. Raulins he was not able to form the opinion referred to in Section 23. It cannot be said that the signing of the Section 23 report by Mr. Betteridge was either full or even substantial compliance with Section 23 of the Immigration Act. Appeal dismissed on law.

For the appellant: T.W. Stewart, Barrister and Solicitor; For the respondent: E.R. Sojonky, Barrister and Solicitor.

14. Otis RAULINS,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 29 juillet 1969; Dossier: 69-142.

Coram: J.C.A. Campbell, vice-président, A.B. Weselak, U. Benedetti.

Examen - caractère - Enquête - fondements de - rapport prévu à l'article 23 non signé par le fonctionnaire préposé à l'examen - validité. - Loi sur l'immigration: 20, 23.

L'appelant, un citoyen des États-Unis âgé de 31 ans, séparé de sa femme et de ses enfants, est entré au Canada le 25 juin 1967 comme non-immigrant pour une préiode de deux jours. Il a présenté une demande d'admission permanente à M. Betteridge le 5 juillet 1968; il a été examiné par M. Young et sa demande a été refusée; on lui a demandé de partir avant le 19 juillet 1968. Il n'est pas parti; M. Betteridge a rendu un rapport prévu à l'article 23; une enquête a eu lieu et une ordonnance d'expulsion a été rendue le 21 janvier 1969.

Arrêt: La Commission, après avoir étudié attentivement les articles ci-devant mentionnés, conclut qu'un fonctionnaire à l'immigration, avant de pouvoir se former une opinion qui entraînerait la remise d'un rapport prévu à l'article 23, doit examiner personnellement, d'une façon raisonnable et régulière, la personne intéressée. Une fois terminé cet examen raisonnable et régulier, le fonctionnaire à l'immigration qui l'a fait subir, s'il croit devoir présenter un rapport prévu à l'article 23, doit signer ce rapport. C'est sur ce rapport que se fonde l'enquête. Si, au lieu de celui qui a fait l'examen raisonnable et régulier, c'est un autre fonctionnaire à l'immigration qui signe le rapport prévu à l'article 23, la Commission estime que l'enquête entraînée par ce rapport est nulle et que l'enquêteur spécial n'est pas compétent pour la tenir.

Dans l'instance la Commission trouve que c'est M. Young et non M. Betteridge qui a fait l'examen raisonnable et régulier de l'appelant sur lequel se fonde l'opinion demandée à l'article 23. C'est donc Mr. Young qui aurait dû signé le rapport prévu à l'article 23. Comme M. Betteridge n'a pas examiné régulièrement et raisonnablement M. Raulins, il ne pouvait pas formuler l'opinion dont il est question à l'article 23. On ne peut pas dire que lorsque M. Betteridge a signé le rapport prévu à l'article 23 il a respecté entièrement ou même suffisament l'article 23 de la Loi sur l'immigration. - L'appel est rejeté comme tel.

Pour l'appelant: Me T.W. Stewart; Pour l'intimé: Me E.R. Sojonky. 15. Douglas Bruce SEROFF,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: August 27, 1969; File: 69-837.

Landing - Application for - effect of withdrawal. - Further examination - nature of - whether right to counsel. - Immigration Act: 2(a)(f), 24; Immigration Regulations: 28(2).

Appellant, an unmarried twenty-two year old citizen of the U.S.A., applied at Lansdowne, Ontario, for permanent admission to Canada; he did not fully complete the application form but was allowed to withdraw it as the Immigration officer told him that as he did not have a job or any particular job skills he was afraid appellant would not be able to get a job and would have to go on welfare. He was also told he could not apply as a visitor. He returned to the U.S.A. and immediately proceeded to Prescott, Ontario, where he applied for entry as a visitor, but was turned back. On May 1st or 2nd 1969 he entered Canada as a visitor, obtained a written offer of employment and returned to the U.S.A. He applied once more on May 15, 1969 for permanent admission at Queenston Bridge, Ontario, answering in the negative to the question 31(2)(d) "(Have you been refused admission to or deported from Canada or any other country?)". A further examination was conducted and an order issued May 15, 1969.

Held: The Board is satisfied from the evidence that there was in fact a withdrawal of appellant's application dated April 30, 1969 at Lansdowne and so, in its opinion, appellant was entitled to say that he had not been refused admission at Lansdowne on the basis of his application for permanent residence. However, on the same date, at the same place and after withdrawing his application for permanent admission he requested permission and returned to the U.S.A.

When he completed his application of May 15, 1969, and answered "no" to question 31(2)(d) this answer was untrue as, by definition, admission refers to entry into Canada of both immigrants and non-immigrants.

He also lacks a letter of pre-examination which is required from an applicant for permanent admission from the  ${\rm U.S.A.}$ 

Finally, a further examination is simply an interview by an Immigration officer stationed at a border point to determine if a person coming within the ambit of section 24(1) may be admitted to Canada. It is not a formal Inquiry, and a person being examined under further examination procedure has no right or entitlement to have counsel present.

15.
Douglas Bruce SEROFF,

appelant,

V.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 27 août 1969; Dossier: 69-837.

Coram: J.C.A. Campbell, vice-président, Jean-Pierre Houle, J.A. Byrne.

Réception - demande - conséquences du retrait. - Examen supplémentaire - caractère - droit à un conseiller. - Loi sur l'immigration: 2(a)(f), 24; Règlement sur l'immigration: 28(2).

L'appelant, célibataire, âgé de 22 ans, citoyen des États-Unis, a demandé l'admission permanente au Canada à Lansdowne, Ontario; il n'a pas totalement rempli sa demande et il lui a été permis de la retirer lorsque le fonctionnaire à l'immigration lui a dit que, puisqu'il n'avait pas d'emploi ni de qualifications professionnelles précises, il craignait que l'appelant ne réussirait pas à trouver un emploi et qu'il serait obligé de demander des prestations de bienêtre. On lui déclara aussi qu'il ne pourrait être admis comme visiteur. Il retourna donc aux États-Unis et se rendit immédiatement à Prescott, Ontario, où il demanda l'admission à titre de visiteur; sa demande fut refusée. Le ler ou le 2 mai 1969, il est entré au Canada comme visiteur; il a obtenu une offre d'emploi par écrit et il est retourné aux Etats-Unis. Il demanda l'admission permanente une deuxième fois à Queenston Bridge, Ontario, le 15 mai 1969; il répondit alors par la négative à la question 31(2)(d) ('Have you been refused admission to or deported from Canada or any other country?"). Un examen supplémentaire a eu lieu et une ordonnance a été rendue le 15 mai 1969.

Arrêt: La Commission est convaincue, d'après la preuve, que la demande de l'appelant en date du 30 avril 1969 à Lansdowne a été retirée et elle estime que l'appelant avait raison de déclarer qu'on ne lui avait pas refusé l'admission à Lansdowne à l'égard de sa demande de résidence permanente. Cependant, à la même date et au même endroit, après avoir retiré sa demande d'admission permanente, il a demandé la permission d'entrer comme visiteur, donc comme non-immigrant. Cette permission lui fut refusée et il retourna aux États-Unis.

Lorsqu'il a rempli sa demande du 15 mai 1969 et qu'il a répondu "'No", à la question 31(2)(d), sa réponse était fausse puisque, par définition, l'admission s'applique à l'entrée au Canada et des immigrants et des non-immigrants.

Il lui manquait aussi une lettre de pré-examen qui est exigée d'un requérant qui veut être admis en permanence en provenance des  ${\it Etats-Unis.}$ 

If it had been Parliament's intention to give a person being examined by way of a further examination the right or entitlement to counsel, then undoubtedly section 24(1) would have said so. The unavailing request for counsel made by appellant does not invalidate or nullify the further examination conducted in his case. - Appeal dismissed.

For the appellant: S. M. Leikin, Barrister and Solicitor; For the respondent: E. R. Sojonky, Barrister and Solicitor.

Finalement, un examen supplémentaire n'est qu'une entrevue d'un fonctionnaire à l'immigration en fonction à un poste frontière en vue de déterminer si une personne qui tombe sous la juridiction de l'article 24(1) peut être admise au Canada. Il ne s'agit pas d'une enquête officielle et la personne examinée à l'enquête supplémentaire n'a pas droit à la présence d'un conseiller. Si le Parlement avait eu l'intention d'accorder à la personne examinée le droit d'être représentée par un conseiller, l'article 24(1) l'aurait sans doute mentionné. Que l'appelant aid demandé sans succès à être représenté ne rend pas l'examen supplémentaire auquel il a été sujet nul et non valide. - L'appel est rejeté.

Pour l'appelant: Me S.M. Leikin; Pour l'intimé: Me E.R. Sojonky. 16. Stefania PODLASZECKA,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 8, 1969; File: 69-1924.

Coram: A.B. Weselak, Jean-Pierre Houle, Gérard Legaré.

Landing - application for - under former and new regulations - effect. Evidence - additional information - admissibility on appeal. - Immigration Regulations: 34; Immigration Appeal Board Act: 7(2)(c), 11, 22, 14.

Appellant arrived in Canada from Poland on November 17, 1966, with a Polish passport valid to September 19, 1967. She was granted a tourist visa to expire May 16, 1967, date at which she notified the Department of her intention to apply for permanent residence, which was done June 14, 1967. The Department sent her a letter of refusal dated June 15, 1967, and asked to leave by July 5, 1967. She was assessed on June 7, 1968, under the new regulations, receiving 32 units. A letter dated July 18, 1968 advised her she had not met the required norms of assessment and requested her departure by August 1, 1968.

Held: There was no evidence before the Special Inquiry Officer to indicate that appellant filed a further application under the new regulations which came into effect on October 1st 1967. So she did not become an "applicant in Canada" within the meaning of section 34 of the Regulations. As of May 16, 1967, there was no such thing as an "applicant in Canada". The Board on review of the evidence received by the Special Inquiry Officer can find nothing to show that appellant was an applicant in Canada within the meaning of said section 34, and so the ground relating to this is invalid.

Further, a reading of sections 7(2)(c), 11, 22 and 14 indicates that while the Board can receive additional information at a hearing of the appeal, there must have been sufficient evidence before the Special Inquiry Officer at the Inquiry to prove the grounds in the order and justify the making of the order. If it finds that the evidence before the Special Inquiry Officer does not support a ground in the order, this ground is invalid. Evidence which is material, and facts which must be proved to support a ground in the order cannot be accepted or proved on appeal, if not presented or proved before the Special Inquiry Officer. - Appeal dismissed.

For the appellant: John Hladun, Esq.; For the respondent: J. Pasman, Esq.

16. Stefania PODLASZECKA,

appelante,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 8 septembre 1969; Dossier: 69-1024.

Coram: A.B. Weselak, Jean-Pierre Houle, Gérard Legaré.

Réception - demande de - en vertu de l'ancien et du nouveau règlement - conséquences. - Preuve - renseignements supplémentaires recevabilité en appel. - Règlement sur l'immigration: 34; Loi sur la Commission d'appel de l'immigration: 7(2)(c), 11, 22, 14.

L'appelante est arrivée au Canada de Pologne le 17 novembre 1966 avec un passeport polonais valide jusqu'au 19 septembre 1967. Il lui fut accordé un visa de touriste qui devait expirer le 16 mai 1967, date à laquelle elle avisa le Ministère de son intention de demander la résidence permanente, ce qu'elle fit le 14 juin 1967. Le Ministère lui envoya une lettre de refus en date du 15 juin 1967 et lui demanda de partir avant le 5 juillet 1967. Sa demande fut appréciée le 7 juin 1968 en vertu de l'ancien règlement et il lui fut accordé 32 points. Une lettre en date du 18 juillet 1968 l'informait qu'elle ne répondait pas aux normes de l'appréciation et lui demande de partir avant le ler août 1968.

Arrêt: Aucune preuve ne fut présentée à l'enquêteur spécial voulant que l'appelante ait déposé une deuxième demande en vertu du nouveau règlement entré en vigueur le ler octobre 1967. Elle n'est donc pas devenue "requérante se trouvant au Canada" aux termes de l'article 34 du Règlement. Le 16 mai 1967 il n'existait pas de "requérants se trouvant au Canada". Ayant revisé la preuve reçue par l'enquêteur spécial, la Commission ne trouve aucune indication que l'appelante était requérante se trouvant au Canada aux termes de l'article 34; le motif qui a trait à cela n'est donc pas valide.

Par ailleurs, la lecture des articles 7(2)(c), 11, 22 et 14 indique que, même si la Commission peut recevoir des renseignements supplémentaires à l'audition de l'appel, des preuves suffisantes doivent avoir été présentées à l'enquêteur spécial au cours de l'enquête pour appuyer les motifs de l'ordonnance et en justifier l'émmission. Si elle décide que la preuve présentée à l'enquêteur spécial n'appuie pas un motif de l'ordonnance, ce motif n'est pas valide. Des preuves qui ont trait directement au litige et les faits

qui devraient être prouvés pour étayer un motif de l'ordonnance ne peuvent être acceptés ou prouvés à l'appel s'ils n'ont pas été présentés ou prouvés devant l'enquêteur spécial. -L'appel est rejeté.

Pour l'appelante: M. John Hladun; Pour l'intimé: M. J. Pasman. 17.
Everett Basil RODNEY,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 9, 1969; File: 69-526.

Coram: J.C.A. Campbell, Vice-chairman, U. Benedetti, J.A. Byrne.

Non-immigrant - whether bona fide - criteria to determine. - Immigration Regulations: 34.

Appellant, age twenty-one single, is a citizen of Jamaica. Since 1966, he has worked in England where he was residing with his parents. He arrived in Canada on March 16, 1969 and requested visiting privileges for 6 months to visit his brother. He was in possession of one hundred and nineteen dollars in cash and a return ticket.

Held: There is a difference between a person who comes into Canada as a non-immigrant (visitor), that is for a special or temporary purpose and for a limited time only, and one who comes into Canada ostensibly as a non-immigrant (visitor) but at the time of entry has the intention of staying permanently in Canada. A bona fide visitor, who after entry, decides to apply for permanent admission is given the right to do so by section 34 of the Regulations, Part 1. The non-immigrant (visitor) who did not disclose his true intention on entering Canada, namely that he wanted to stay permanently, i.e. an immigrant by definition, has not entered Canada in good faith or honestly. He is thereby not a bona fide non-immigrant (visitor) and is subject to deportation. Therefore, on the evidence before him, the Special Inquiry Officer was not manifestly wrong or did not proceed upon a wrong principle when he formed his opinion that the appellant was not a bona fide non-immigrant. - Appeal dismissed.

For the appellant: A. Brewin, Q.C.;

For the respondent: P. Betournay, Barrister and Solicitor.

17. Everett Basil RODNEY.

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 9 septembre 1969; Dossier: 69-526.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Enquête - partialité de l'enquêteur spécial - s'il peut être soulevé en appel. - si enquête complète et régulière. - Loi sur l'immigration: 11(3).

L'appelant est un citoyen de la Jama¶que, célibataire, âgé de 21 ans. Depuis 1966, il travaillait au Royaume-Uni où il demeurait avec ses parents. Il est arrivé au Canada le 16 mars 1969 et il a demandé un permis de séjour de six mois afin de rendre visite à son frère. Il possédait cent dix-neuf dollars en espèces et un billet de retour.

Arrêt: Le critère déterminant la vraisemblance de réelle partialité est objectif: "the reasonable apprehension of a reasonable man apprised of the facts" et une cour ne peut aller jusqu'à considérer les impressions du témoin sur le ton de la voix ou les expressions du visage de la personne dont se plaint le témoin déclarant. La Cour s'arrête à l'examen des mots utilisés pour voir s'ils éveilleraient dans l'esprit d'un bon père de famille une appréhension raisonnable de partialité.

Par ailleurs, si lors de l'enquête un appelant est représenté par un conseiller qui se rend compte de l'apparition d'une vraisemblance réelle de partialité de l'enquêteur spécial - comme dans cette cause - l'objection doit être posée à l'enquête et non soulevée pour la première fois en appel. Omettre de faire cette objection relative à la compétence de l'enquêteur spécial est fatal à la cause de l'appelant, à moins qu'une preuve montre que l'appelant a souffert d'un réel préjudice duquel résulterait un déni de justice naturelle.

D'après les faits contenus dans le dossier il est manifeste que dans cette instance l'appelant a souffert de réel préjudice si ce n'est à cause de la partialité de l'enquêteur spécial, alors du fait que l'enquêteur spécial n'a pas procédé à une enquête complète et régulière (enquête sur le travail effectué au Canada par les appelants). L'enquêteur spécial a suivi les différentes étapes d'une enquêtes complète et régulière - il a reçu les témoignages de M. Janvier et de son prétendu employeur mais avec un "esprit obtus".

Pour l'appelant: M.A. Brewin, c.r.; Pour l'intimé: Me P. Betournay. 18. Evangelos Christos MANOVSSIS (Evagelos MANUSSIS),

appellant,

٧.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 11, 1969; File: 69-160.

Coram: Miss J.V. Scott, Chairman, U. Benedetti, Gérard Legaré.

"Forthwith report" - nature of phrase - "Seeking to come into" - nature of phrase. - Immigration Act: 7(1); 23; Immigration Regulations; 34 of Part I.

Appellant is a 29 year old citizen of Greece, who arrived in Canada in October 1966 as a member of the crew of the ship "Yehuda" and which he deserted at Kingston around October 22, 1966. He worked in Montreal and Niagara Falls. After coming to the attention of Canadian Immigration authorities in December 1968, he endeavoured to cross with friends into the U.S.A. on a temporary visit around December 22, but to was returned to the Canadian Immigration post, where he stated that he wished to reamin in Canada as a permanent resident and filled in an application for permanent residence in Canada. The Inquiry was reld on December 22, 1968 and January 13, 1969, resulting in an order.

Held: There is no doubt that he did not "forwith report" the fact that he had changed the "particular class in which he was admitted as a non-immigrant", when he decided to remain in this country. By the time he did "report" on December 22, 1968, he had long since lost such legal status as he may have had in Canada. Section 34 of the Regulations, Part 1, which provides the machinery for an application for permanent residence while the person applying is in Canada, defines "applicant in Canada" as "a person who has been allowed to enter and remain in Canada as a non-immigrant under subsection (1) of section 7 of the Act other than ... a person described in paragraph (j) of that subsection..."

While appellant "reported" in 1968, he was ineligible to apply for permanent residence, since he was at that time not a person who had been allowed to enter and remain as a non-immigrant. He would, in any event, have been ineligible as a member of a crew.

There remains, however, that although appellant was not eligible to make an application, he did do so, and his testimony throughout all the proceedings confirms that he was a person "seeking to come into" Canada, indeed, "seeking admission", since his intention was to remain in this country and obtain legal status here if possible.

18. Evangelos Christos MANOVSSIS (Evagelos MANUSSIS), appelant.

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 11 septembre 1969; Dossier: 69-160.

Coram: Mlle J.V. Scott, président, U. Benedetti, Gérard Legaré.

"Immédiatement signaler" - nature de cette expression - "Cherchant à venir au" - nature de cette expression. - Loi sur l'immigration: 7(1), 23; Reglement sur l'immigration: 34, Partie 1.

L'appelant est un citoyen de la Grèce, âgé de 29 ans, qui est arrivé au Canada en octobre 1966 comme membre de l'équipage du navire "Yehuda" qu'il a déserté à Kingston vers le 22 octobre 1966. Il a travaillé à Montréal et à Niagara Falls. Les autorités canadiennes de l'immigration s'étant avisées de sa présence en décembre 1968, il tenta avec des amis de passer aux États-Unis pour une visite temporaire vers le 22 décembre, mais on le renvoya au poste de l'immigration canadienne où il déclara vouloir demeurer au Canada comme résident en permanence et remplit une demande de résidence permanente au Canada. L'enquête eut lieu le 22 décembre 1968 et le 13 janvier 1969 et une ordonnance fut rendue.

Arrêt: Il n'a certainement pas "immédiatement signalé" qu'il avait changé de "catégorie particulière dans laquelle il a été admis au titre de non-immigrant" lorsqu'il a décidé de demeurer au Canada. Lorsqu'il l'a "signalé", le 22 décembre 1968, il avait depuis longtemps perdu tout statut légal qu'il aurait pu avoir au Canada. L'article 34 de la Partie 1 du Règlement, qui prévoit la procédure à suivre pour demander la résidence permanente lorsque le requérant se trouve au Canada, définit "requérant se trouvant au Canada" comme étant "une personne qui a obtenu la permission d'entrer et de demeurer au Canada, à titre de non-immigrant, aux termes du paragraphe (1) de l'article 7 de la Loi, sauf... une personne mentionnée à l'alinéa (j) dudit paragraphe ..."

Même si l'appelant a "signalé" en 1968 il n'avait pas le droit de demander la résidence permanente puisqu'à ce moment la il n'avait pas reçu la permission d'entrer et de demeurer à titre de non-immigrant. Il n'aurait pas eu ce droit de toute façon puisqu'il était membre d'équipage.

Il reste cependant que, même si il n'y avait pas droit, l'appelant a fait une demande et son témoignage tout au long de l'instance confirme qu'il était une personne "cherchant à venir au It is clear from a study of the Act as a whole, that where the words "come into" are used in a phrase as an alternative to "admission" as in section 23 "grant admission to or otherwise let such person come into Canada" or alone, for example section 19(1)(e)(x) "came into Canada as a member of a crew", the words "came into" must be given their ordinary dictionary meaning, a geographical the phrase "seeking to come into Canada", which appears frequently in the Act, and is to be found in section 23, in order to give effect to the scheme and intention of the Act as a whole, must be given a quasi-technical meaning, as including, but wider than, the meaning of the phrase "seeking admission". Since admission has no geographical connotation, the phrase "seeking to come into" applies to persons "seeking admission" regardless of their physical location or place of residence at the time such admission is sought". Appellant was therefore properly treated as a person "seeking to come" into Canada. - Appeal dismissed.

For the appellant: T.D. Finn, Barrister and Solicitor; For the respondent: E.F. Sojonky, Barrister and Solicitor.

Canada" et "cherchant à être admis" puisqu'il avait l'intention de demeurer au Canada et d'y obtenir un statut juridique si c'était possible.

L'étude de la Loi dans son ensemble révêle clairement que, lorsque les mots "entrer" ou "venir" ("come into") sont utilisés dans une locution en conjonction alternative avec "admission", comme à l'article 23, "de lui accorder l'admission ou de lui permettre autrement de venir au Canada", ou lorsque l'un de ces mots est utilisé seul, comme à l'article 19(1)(e)(x), "est entré au Canada comme membre d'un équipage", il faut reconnaître aux mots "entrer" ou "venir" leur sens commun, tel qu'il est donné au dictionnaire, soit un sens géographique qui implique le passage physique au Canada à partir de l'extérieur du pays. Cependant, pour appliquer la Loi dans son ensemble, selon son esprit et l'intention du législateur, il faut reconnaître à l'expression "qui cherche à entrer au Canada", fréquemment utilisée dans la Loi et qui se retrouve à l'article 23, un sens quasi-technique plus large que celui de l'expression "cherchant l'admission", mais l'incluant. Puisque l'admission n'a aucune connotation géographique, l'expression "qui cherche à entrer" s'applique aux personnes "cherchant admission" indépendament du lieu où elles se trouvent ou de leur lieu de résidence au moment où elles cherchent l'admission. C'est donc à juste titre que l'appelant a été considéré comme une personne "qui cherche à entrer" au Canada. - L'appel est rejeté.

Pour l'appelant: Me T. D. Finn; Pour l'intimé: Me E.F. Sojonky. 19. APPALSAMI, son of TAMANA,

appellant,

V.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 3, 1969; File: 69-926.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, Gérard Legaré.

Landing - application for - duration of validity - whether can be limited by ministerial act. - Immigration Regulations: 34(1) of Part 1.

Appellant, a thrity-four year old citizen of Fiji, married with six children, first entered Canada as a non-immigrant visitor on May 12, 1967 for a period to expire (with various extensions) November 21, 1967. On that date, he applied for permanent residence in Canada, which application was apparently tentatively approved. He apparently passed the medical examination; his family passed it in Fiji. In December 1968, he left Canada for Fiji due to his wife's illness. Before leaving he consulted Immigration authorities and was advised that his application for permanent residence was valid until January w1, 1969. While in Fiji, a letter dated February 13, 1969 was sent by the Department advising him that the January deadline could not be extended and suggesting an alternative way to pursue his application. On May 4, 1969, appellant returned to Canada, was examined and detained for an Inquiry which resulted in an order.

Held: There appears to be no direct provision in the Immigration Act or Regulations relating to the duration of the validity of an application for permanent residence in Canada. A reading of section 34(1) of the Immigration Regulations, Part I, and of the Immigration Act and Regulations as a whole supports the view that the Department can, as an internal ministerial act, impose a period of validity on application for permanent residence whether made inside or outside Canada to hold otherwise would mean that an application once made would be valid for all time, regardless of changing circumstances, which would be contrary to good sense and proper administration of the relevant law.

At the latest he had lost his status as a non-immigrant applicant in Canada on January 21, 1969, and on his return in May was properly treated as a person seeking to come into Canada, either as an immigrant or as a non-immigrant. The Special Inquiry Officer concluded rightly, on the evidence, that he was presenting himself as an immigrant. - Appeal dismissed.

For the appellant: J.R. Taylor, Barrister and Solicitor; For the respondent: P. Betournay, Barrister and Solicitor.

19. APPALSAMI, fils de TAMANA,

appelant,

V .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 3 novembre 1969; Dossier: 69-926.

Coram: Mlle J.V. Scott, président, A.B. Weselak, Gérard Legaré.

Réception - demande de - durée de la validité - à savoir si elle peut être limitée par une décision ministérielle - Règlement sur l'immigration: 34(1), Partie 1.

L'appelant est un citoyen de Fiji, marié, père de six enfants, qui est entré au Canada pour la première fois comme visiteur (non-immigrant) le 12 mai 1967 pour une période qui devait se terminer, après de nombreuses prolongations, le 21 novembre 1967. À cette date, il avait demandé la résidence permanente au Canada et il semble que sa demande ait reçu une approbation sujette à révision. Il semble avoir subi l'examen médical; sa famille l'a subi à Fiji. En décembre 1968, sa femme étant malade, il a quitté le Canada pour Fiji. Avant de partir, il s'est informé auprès des autorités de l'immigration canadienne et on l'avisa que sa demande de résidence permanente était valide jusqu'au 21 janvier 1969. À Fiji, il reçut une lettre du Ministère, en date du 13 février 1969, l'avisant que la date d'échéance de janvier ne pouvait être reportée et lui suggérant une autre façon de présenter sa demande. Le 4 mai 1969, l'appelant est revenu au Canada, a été examiné et détenu en vue d'une enquête qui donna lieu à l'ordonnance.

Arrêt: Ni la Loi si le Règlement sur l'immigration ne semblent prévoir directement la durée de la validité d'une demande de résidence permanente au Canada. La lecture de l'article 34(1) de la Partie 1 du Règlement sur l'immigration et de l'ensemble de la Loi et du Règlement soutient l'avis que le Ministère peut, par une décision interne, imposer une période de validité de la demande de résidence, qu'elle soit faite à l'intérieur ou à l'extérieur du Canada; une position contraire entraînant ceci: lorsqu'une demande est faite elle demeure toujours valide, même si les circonstances changent, ce qui est contraire au bon sens et ne permet pas une application rationnelle de la loi en question.

L'appelant avait perdu au plus tard le 21 janvier 1969, son statut de requérant indépendant alors qu'il se trouvait toujours au Canada et lorsqu'il est revenu en mai il fut à juste titre considéré comme une personne cherchant à entrer au Canada à titre d'immigrant ou de non-immigrant. L'enquêteur spécial a eu raison de conclure, d'après la preuve, qu'il se présentait comme immigrant. - l'appel est rejeté.

Pour l'appelant: Me J.R. Taylor; Pour l'intimé: Me P. Betournay. 20. Shiri RAM,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 4, 1969; File: 69-634.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Evidence - onus of proof as to assessment - occupational demand guide. - Inquiry - whether service of order is sufficient compliance with section 19(2). - Immigration Act: 19(2); Immigration Inquiries Regulations 8(b).

Appellant, a twenty-seven year old citizen of the United Kingdom and Fiji, single, entered Canada as a non-immigrant visitor on December 17, 1968 for a period to expire April 17, 1969. On December 31, 1968 he applied for permanent residence, and later filled a full 0.S. 8 application form dated January 6, 1969, showing his present occupation as a machinist and intended one as a sawmill machinist. He was interviewed and assessed, receiving a total of thirty-seven units.

Held: Failure to comply with any of the provisions of the Act or Regulations places appellant within a prohibited class as provided by section 5(t) of the Act. In the instant appeal, Mr. Ram had the burden of proving that he could comply with the norms of assessment provided for in the Immigration Regulations Part I. It is true that he cannot satisfy this burden if he has no access to the occupational demand guide and, possibly, to the Immigration officer who made the assessment. Appellant's counsel, however, made no effort at the inquiry or before the Board, to obtain this testimony. His remarks before the Board leave the impression that he wanted the Board to initiate the necessary procedures for bringing the evidence before it, in other words, that the Board should, on its own initiative, assist the appellant in proving his case. In the circumstances of this appeal, where appellant was represented throughout by able and experienced legal counsel, such action by the Board would appear to be inappropriate.

ellant failed to satisfy the burden of proof imposed upon and one had a failed to take the necessary steps to do so.

Further, the person concerned must be informed "as to the provisions of the Act or the Immigration Regulations pursuant to which the order was made" forthwith upon making such order (section 8(b) Immigration Inquiries Regulations). Service of the order on the person concerned in compliance with this section, is in itself sufficient compliance with section 19(2). The intention of this section is clear,

20. Shiri RAM,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 4 novembre 1969; Dossier: 69-634.

Coram: M1le J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Preuve - charge de la preuve quant à l'appréciation - guide des occasions d'emploi - Enquête - à savoir si la signification de l'ordonnance satisfait suffisamment aux exigences de l'article 19(2). - Loi sur l'immigration: 19(2); Règlement sur les enquêtes de l'immigration 8(b).

L'appelant, célibataire âgé de 27 ans, citoyen du Royaume-Uni et de Fiji, est entré au Canada comme visiteur non-immigrant le 17 décembre 1968 pour une période devant se terminer le 17 avril 1969. Le 31 décembre 1968 il a demandé la résidence permanente et il a plus tard rempli au complet la formule de demande O.S.8 en date du 6 janvier 1969, indiquant que sa profession actuelle était celle d'ajusteur de machines-outils et qu'il comptait exercer la profession d'ajusteur de scies mécaniques. À l'entrevue et à l'appréciation il a reçu trente-sept points.

L'appelant, qui n'observe pas l'une des dispositions de la Loi ou du Règlement sur l'immigration, se trouve placé dans une catégorie interdite selon l'article 5(t) de la Loi. Dans l'instance, M. Ram était chargé de prouver qu'il pouvait satisfaire aux normes d'appréciation établies dans la Partie 1 du Règlement sur l'immigration. Il est vrai qu'il ne peut s'acquitter de cette charge s'il n'a pas accès au guide des occasions d'emploi et, possiblement, au fonctionnaire à l'immigration qui a fait l'appréciation. Cependant le conseiller de l'appelant n'a pas essayé d'obtenir ce témoignage, ni à l'enquête ni devant la Commission. Ses remarques devant la Commission laissent à supposer qu'il désirait que la Commission entreprenne les démarches nécessaires pour présenter la preuve, en autres mots, que la Commission prenne l'initiative d'aider l'appelant à présenter la preuve en sa faveur. Dans les circonstances de cet appel, puisque l'appelant a toujours été représenté par un conseiller juridique compétent et expérimenté, une telle initiative de la part de la Commission n'eut pas semblée correcte.

L'appelant ne s'est donc pas acquitté de la charge de la preuve et il a même négligé d'entreprendre les démarches en ce sens.

Par ailleurs, lorsqu'une ordonnance est rendue, la personne intéressée doit être mise au courant "des dispositons de la Loi ou du

and in accordance with the dictates of natural justice: every person seeking to contest a punitive order, i.e. an order of deportation, should be advised of the grounds on which the order is based, the "charge" which he has to contest on his appeal. In expressing this idea, the use of the word "appellant" in the subsection may be unfortunate. The subject of an order of deportation, neatly referred to in the Immigration Act as "the person concerned", is not an "appellant" until he serves his notice of appeal after he has himself been served with the order of deportation. The words "shall be advised by the Minister", do not, however, recessarily imply a time element, and if the person concerned has been served with an order of deportation setting out the grounds thereof with sufficient particularity that he is aware of the case he has to meet, the requirements of section 19(2) have been satisfied and carnot be affected by the fact that he was not, technically, an appellant, at the time he was served. In any event, the appellant is served again, forthwith upon filing his notice of appeal. - Appeal dismissed.

For the appellant: Dr. D.P. Pandia, Barrister and Solicitor;

For the respondent: F.D. Craddock, Esq.

Règlement sur l'immigration en vertu desquelles l'ordonnance a été rendue" (article 8(b) du Règlement sur les enquêtes de l'immigration". La signification de l'ordonnance à la personne intéressée satisfait à cette disposition et est suffisamment conforme à l'article 19(2). L'intention de cet article est clair et conforme aux principes de la justice naturelle: toute personne qui cherche à contester une ordonnance à caractère pénal, comme une ordonnance d'expulsion, doit être avisée des motifs de l'ordonnance, qui constituent "l'accusation" dont il doit se défendre en appel. L'utilisation du mot "appelant" dans le paragraphe n'exprime peut-être pas assez clairement cette idée. La personne qui fait l'objet d'une ordonnance d'expulsion, correctement appelée dans la Loi sur l'immigration "la personne intéressée" n'est pas un "appelant" avant d'avoir signifié son appel par avis après s'être vu signifié l'ordonnance d'expulsion. Les mots "doit être avisé par le Ministre" n'impliquent pas nécessairement un élément de temps et si l'ordonnance d'expulsion signifiée à la personne intéressée exposait les motifs de l'expulsion d'une façon assez précise pour que la personne sache contre quelles allégations elle doit se défendre, les exigences de l'article 19(2) se trouvent satisfaites, indépendament du fait qu'elle n'ait pas été techniquement un appelant au moment de la signification. D'ailleurs, l'appelant est sujet à une autre signification immédiatement après le dépot de son avis d'appel. - L'appel est rejeté.

Pour l'appelant: Dr. D.P. Pandia, avocat;

Pour l'intimé: M. F.D. Craddock.

21. Spyridon KOURIS,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 5, 1969; File: 69-784.

Coram: J.C.A. Campbell, Vice-chairman, U. Benedetti, J.A. Byrne.

Inquiry - whether full and proper without application for landing form as evidence. - Visa and medical certificate as grounds - prematurely invoked. - Immigration Regulations: 28(1), 29(1), 34(3)(f).

Appellant, age twenty-five, single, a citizen of Greece, came to Canada on August 28, 1968, as a visitor for a period to expire October 14, 1968. He applied for landing on October 4, 1968, and on December 4, 1968, was assessed but was unable to meet the norms set out for an independent applicant under Schedule A of the Regulations. An inquiry was held on April 29, 1969, pursuant to a section 23 report, and on the same day an order was issued.

Held: There is no evidence to show that the assessing officer had in his possession the O.S. 8 form - Application for Permanent Residence in Canada. Said application was not introduced as an Exhibit at the Inquiry or at the hearing of the appeal.

Therefore, the Special Inquiry Officer failed to conduct a full and proper Inquiry and could not have reached his decision if he did not have as evidence the O.S. 8 form.

The grounds under sections 28(1) and 29(1) are technical grounds and so are prematurely invoked. - Appeal allowed.

For the appellant: H. Blank, Q.C.,; For the respondent: R. Léger, Barrister. 21. Spyridon KOURIS,

appelant,

V .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 5 novembre 1969; Dossier: 69-784.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Enquête - à savoir si elle est complète et régulière sans que la demande de réception soit présentée en preuve. - Visa et certificat médical comme motifs - invoqués prématurément. - Règlement sur l'immigration: 28(1), 29(1), 34(3)(f).

L'appelant, célibataire âgé de 25 ans, citoyen de la Grèce, est arrivé au Canada comme visiteur le 8 août pour une période qui devait se terminer le 14 octobre 1968. Il a demandé à être reçu le 4 octobre 1968 et sa demande a été appréciée le 4 décembre 1968 mais il n'a pas réussi à répondre aux normes établies par l'annexe A du Règlement à l'égard des requérants indipendants. Une enquête a eu lieu le 29 avril 1969, à la suite d'un rapport prévu à l'article 23 et une ordonnance d'expulsion a été rendue le même jour.

Arrêt: Il n'est pas prouvé que le fonctionnaire préposé à l'appréciation avait en sa possession la formule O.S. 8 - Demande de résidence permanente au Canada. Cotte pièce n'a été produite ni à l'audition de l'appel.

Par conséquent, l'enquêteur n'a pas tenu une enquête complète et régulière puisqu'il ne pouvait pas en arriver à une décision sans que la formule O.S. 8 soit déposée en preuve.

Les motifs prévus par les articles 28(1) et 29(1) sont des motifs techniques et sont donc invegués prématurément. - L'appel est accordé.

Pour l'appelant: Me H. Blank, c.r.;

Pour l'intimé: Me R. Léger.

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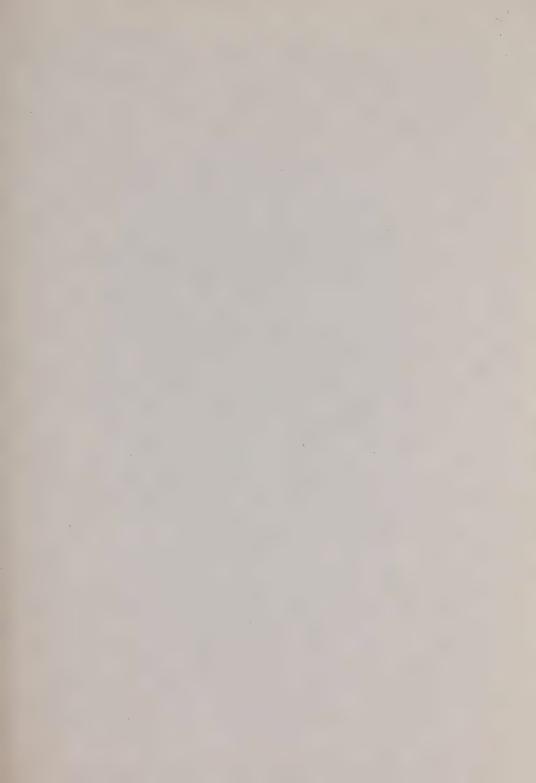
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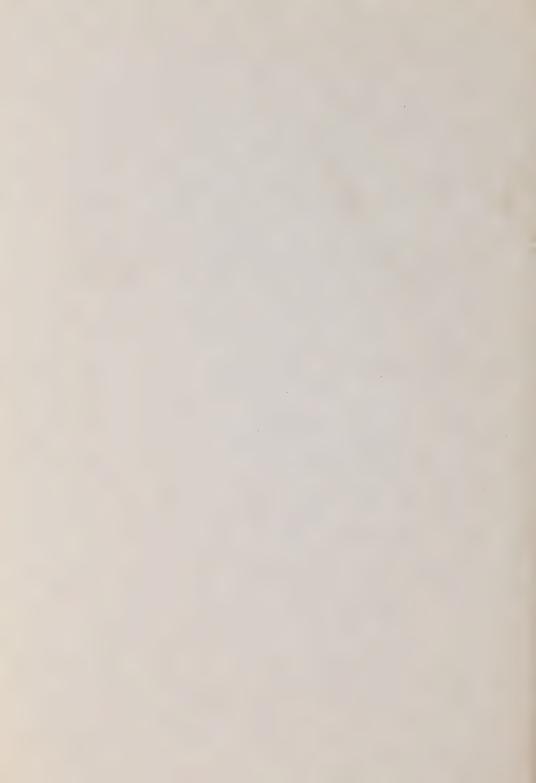
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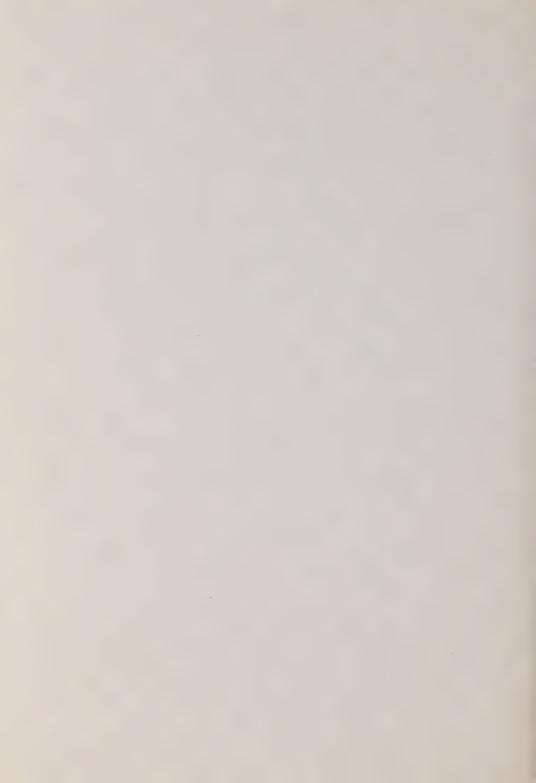


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CANADA

November 1 novembre 1970



# (1970) TI I.A.C.

DES ERRATA

- Page 7 (English), line 1:

MONGARI

- Page 7 (French), lines 26, 32-3:
  change "preuve 'prima facie'"
  to "un commencement de preuve
  par écrit".
- Page 22 (English), line 35: change "understnad" to "understand".
- Page 33 (French), line 21: change "Rossy" to "Rossi".
- Page 41 (English), line 28: change "staturoty" to "statutory".
- Page 42 (English), bottom line: change "Vachon" to "Nadon".
- Page 43 (French):
  .line 2: change "étand" to
  "étant";
- .line 5: change "Minister of Manpower and" to "Ministre de la Main-d'oeuvre et de l'".
- Page 62 (English), line 27: change "pregnancy pay" to "Pregnancy pay".
- Page 62 (French), lines 27-8: change "montrent que" to "le montre, ont toujours été faites et".
- age 68 (French), line 2 from bottom: change "constituait" to "constituait".
- age 70 (French), line 14: change "détachable" to "divisible".
- please invert to become pages 86 (on left): please invert to become pages 86 (on left) and 85 (on right) respectively.

# (1970) II A.I.A.

ERRATA

- 1 Page 7 (anglaise), ligne 1:
   annuler un "is 'in writing'".
- 2 Page 7 (française), lignes 26, 32-3: remplacer "preuve "prima facie!" par "un commencement de preuve par écrit".
- 3 Page 22 (anglaise), ligne 35: remplacer "understnad" par "understand".
- 4 Page 33 (française), ligne 21: remplacer "Rossy" par "Rossi".
- 5 Page 41 (anglaise), ligne 28: remplacer "staturoty" par "statutory".
- 6 Page 42 (anglaise), dernière ligne: remplacer "Vachon" par "Nadon".
- 7 Page 43 (française):
   .ligne 2: remplacer "étand" par
   "étant";
   .ligne 5: remplacer "Minister of
   Manpower and" par "Ministre de la
   Main-d'oeuvre et de l'".
- 8 Page 62 (anglaise), ligne 27: remplacer "pregnancy pay" par "Pregnancy pay".
- 9 Page 62 (française), lignes 27-8: remplacer "montrent que" par "le montre, ont toujours été faites et".
- 10 Page 68 (française), avant-dernière ligne: remplacer "constituait" par "constituait".
- 11 Page 70 (française), ligne 14:
   remplacer "cétachable" par
   "divisible".
- 12 Intervertir les pages 85 (à droite) et 86 (à gauche); elles deviennent respectivement pages 86 (à gauche) et 85 (à droite).



- Page 87 (French), line 21: change "colsed" to "closed".
- Page 91 (English), line 41: change "deliverations" to "deliberations".
- Page 91 (French), line 16: underline "voidable".
- Page 99 (English), line 13: change "ans" to "sans".
- Page 100 (French), line 3: change "Aors" to "Alors".
- Page 104 (French), lines 11-2: change "est partiellement incomplète pour constituer un fait à aucun moment contesté" to "comporte un léger vice de forme - fait jamais soulevé".
- Page 105 (French), line 11: add "ou" after "développer,".
- Page 114 (French), line 4: add "été" after "aurait".

- 13 Page 87 (française), ligne 21: remplacer "colsed" par "closed".
- 14 Page 91 (anglaise), ligne 41:
   remplacer "deliverations" par
   "deliberations".
- 15 Page 91 (française), ligne 16: souligner "voidable".
- 16 Page 99 (anglaise), ligne 13:
   remplacer "ans" par "sans".
- 17 Page 100 (française), ligne 3: remplacer "Aors" par "Alors".
- 18 Page 104 (française), lignes 11-2:
  remplacer "est partiellement
  incomplète pour constituer un fait
  à aucun moment contesté" par "comporte
  un léger vice de forme fait jamais
  soulevé".
- 19 Page 105 (française), ligne 11: ajouter "ou" après "développer,".
- 20 Page 114 (française), ligne 4: ajouter "été" après "aurait".



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[1970] **VOLUME II** 

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Renvoi (1970) II A.I.A.

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23. Leonardo CARUANA,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 3, 1969; File: 69-6147.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Evidence - admissibility - Section 19 and section 26 documents - form of - validity Ministerial document at hearing. - Inquiry - introduction of corrected report and original direction - validity - Conditions precedent to inquiry - SIO's jurisdiction to issue warrant for arrest - validity of arrest on suspicion. - Whether other Immigration Officer's participation is prejudicial. - Foreign law - presumption of similarity to Canadian law. "False and misleading" - meaning. Immigration Act: 11, 15, 16, 19, 20(2), 23, 24, 25, 26, 27(4); Immigration Inquiries Regulations: 6, 7, 8; Immigration Appeal Board Act: 7(2)(c); Interpretation Act (16 Eliz. II, c. 7); 28(42); Québec Code of Civil Procedure: 234.

Held: Both the Section 19 report and the Section 26 must be "written" or "in writing". Telex transcriptions of these must be held to have been "written or "in writing" within the clear meaning of Section 28 (42) of the Interpretation Act, 16 Eliz. II, c. 7.

Sections 26 of the Act and 6 of the Inquiries Regulations lead to the conclusion that the Direction must contain some indication as to its source, i.e. that it was in fact made by the Director or someone properly authorized to act on his behalf.

The Direction was filed as evidence that the Special Inquiry Officer has been required pursuant to Section 26 to hold the inquiry, and in so far as "the facts contained therein" are relevant to that point, it is prima facie proof thereof: These facts include the "signature" and the "official character" of the person purporting to make it.

Further, Section 7(2)(c) allows the Board to depart from the usual practice of a conventional appeal court and points up its character as a Cour d'exception, so that hearings of appeals before it may be more of the nature of a trial de novo than a true appeal. Therefore, the Board can accept and use, in reaching its decision, the ministerial document authorizing "J.L. Manion" to act for the Director of Manpower and Immigration.

23. Leonardo CARUANA,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 3 décembre 1969; Dossier: 69-6147.

Coram: M1le J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Preuve - admissibilité - documents prévus par l'article 19 et l'article 26 - leur forme - validité. - Document ministériel à l'audition. - Enquête - introduction d'un rapport corrigé et de l'ordre original - validité - Conditions préalables à une enquête - compétence de l'enquêteur spécial quant à l'émission d'un mandant d'arrestation - validité de l'arrestation sur suspicion. - Participation d'un autre fonctionnaire à l'immigration : préjudice ou pas - Lois étrangères - présomption de similarité à la loi canadienne - "False and misleading" - sens. Loi sur l'immigration: 11, 15, 16, 19, 20(2) 23, 24, 25, 26, 27(4); Règlement sur les enquêtes de l'immigration: 6,7,8; Loi sur la Commission d'appel de l'immigration: 7(2)(c) Loi d'interprétation (16 Eliz. II c. 7): 28(42); Code de procédure civile du Québec: 234.

Arrêt: Le rapport prévu par l'article 19 et l'ordre prévu par l'article 26 doivent tous les deux être "écrits" ou "donnés par écrit". La transcription au téléscripteur de ces documents doit être tenue par "écrit" ou "donné par écrit" au sens clair de l'article 28 (42) de la Loi d'interprétation, 16 Eliz. II c. 7.

L'article 26 de la loi et l'article 6 du Règlement sur les enquêtes portent à conclure que le texte de l'ordre doit contenir une indication quant à sa provenance, i.e. indication du fait qu'il a été donné par le directeur ou par une personne dûment autorisée à agir en son nom.

L'ordre a été déposé comme preuve du fait que l'enquêteur spécial avait été tenu en vertu de l'article 26 de procéder à une enquête et, dans la mesure où "les faits y contenus" sont relatif à ce fait, l'ordre constitue une preuve prima facie du fait; ces "faits y contenus" comprennent la "signature" et le "caractère officiel" de la personne qui prétend donner l'ordre.

Par ailleurs, l'article 7(2)(c) permet à la Commission de s'écarter de la procédure habituelle d'une cour d'appel conventionelle et souligne son caractère de Cour d'exception, de sorte que l'audition des appels qu'elle doit connaître a davantage le caractère d'un procès de novo que celui d'un véritable appel. La Commission peut donc

Further the introduction of a corrected report, and the original of the direction in conformity with sections 7 and 8 of the inquiries Regulations half way through an inquiry and a year after it commenced, cannot be held to be in compliance with these sections.

A study of the Immigration Act as a whole leads to the conclusion that sections 11, 19 and 26, 29(2), 23 and 24, 15 and 16 with 25 must be read together as setting out a scheme for the commencement and conduct of inquiries. There is therefore a condition precedent to instituting an inquiry, namely: a section 23 report valid as to form, or a section 26 direction valid as to form, or a valid warrant of arrest or an actual arrest pursuant to section 16. But the Director has discretion under section 26 to cause an inquiry to be held, or not, as he sees fit.

The jurisdiction of the Special Inquiry Officer to issue the warrant for arrest cannot be presumed, and there was no proof that he did in fact have such jurisdiction. The issuance of the warrant by an unauthorized person is not an "official act" and the rebuttable presumption that all necessary conditions, precedents and formalities have been complied with cannot apply.

Section 16 of the Act requires no formalities in its administration and it authorizes an arrest on suspicion. As appellant was a person suspected of being a person referred to in Section 19(1)(e) (viii) he could be legally arrested pursuant to section 16 and he was.

Further, as to demand for recusation, a Special Inquiry Officer is no more than a quasi-judicial officer, and while he must of course act "judicially" the mere presence at, and active participation in an inquiry, of another immigration official, with whom the Special Inquiry Officer may have conferred before or even during the course of the inquiry, does not automatically prejudice the position of the subject of the inquiry to such a degree as to invalidate the inquiry. The Québec Code of Civil Procedure, does not apply to proceedings under the Immigration Act; in any event, section 234 of said Code clearly refers to "a judge".

Further, there was no proof of Italian law, as such, before the Special Inquiry Officer - and foreign law is a fact to be proved by the party seeking to rely on it. Even without proof that the crimes before the Special Inquiry officer were Italian crimes, the presumption that foreign law is the same as that of Canada, unless the contrary be proved, supports the decision, since on the face of the judgments the acts complained of would fall within section 304 of the Criminal Code.

The Special Inquiry Officer had neither the jurisdiction, nor the necessary evidence to enable him to retry Mr. Caruana for the offences alleged. He had before him undoubted proof of conviction by foreign courts, for an act which was a recognizable and identifiable crime by Canadian law, and he was therefore correct in concluding that Mr. Caruana had been convicted of a crime within the meaning of the Immigration Act.

recevoir le document ministériel autorisant "J.L. Manion" à agir au nom du directeur de la Main-d'oeuvre et de l'Immigration et en tenir compte dans sa décision.

Par ailleurs, l'introduction d'un rapport corrigé et de l'ordonnance originale, en vertu des articles 7 et 8 du Règlement sur les enquêtes, au milieu de l'enquête et un an après son début, ne peut être tenue pour conforme à ces articles.

Une étude de la Loi sur l'immigration dans son ensemble porte à conclure que les articles 11, 19 et 26, 20(2), 23 et 24, 15 et 16 et 25 constituent un tout qui établit une procédure pour l'initiation et la poursuite des enquêtes. Il y a donc une condition préalable à l'ouverture d'une enquête, soit: le rapport prévu par l'article 26, en bonne et due forme, ou un mandat d'arrestation en bonne et due forme, ou une arrestation de fait en vertu de l'article 16. Cependant le directeur a le pouvoir, en vertu de l'article 26, de faire tenir une enquête ou de ne pas le faire selon ce qu'il juge approprié.

On ne peut présumer du pouvoir de l'enquêteur spécial d'émettre un mandat d'arrestation et il n'y a pas de preuve à l'effet qu'il ait eu en fait ce pouvoir. L'émission d'un mandat par une personne non autorisée n'est pas un "official act" et la présomption réfutable qui veut que l'on ait tenu compte de toutes les conditions préalables et formalités nécessaires ne peut s'appliquer ici.

L'article 16 de la loi ne prévoit aucune formalité quant à son application et il autorise l'arrestation sur suspicion. Puisque l'appelant était soupçonné d'être une personne visée par l'article 19 (1) (e) (viii), il pouvait légalement être arrêté en vertu de l'article 16, ce qui fut fait.

Par ailleurs, quant à une demande de récusation, un enquêteur spécial n'est qu'un fonctionnaire quasi-judiciaire, et quoique il doive poser certains actes judiciaires, ni la présence, ni la participation active à une enquête d'un autre fonctionnaire à l'immigration, avec lequel l'enquêteur spécial s'entretient avant ou pendant l'enquête, ne nuisent automatiquement à la position de celui qui fait l'objet de l'enquête à un degré tel qu'il faille invalider l'enquête. Le Code de procédure civile du Québec ne saurait s'appliquer aux procédures sous le régime de la Loi sur l'immigration; de toute façon, l'article 234 dudit Code se rapporte expressément à un "juge".

Par ailleurs, aucune preuve des lois italiennes comme telles ne fut présentée à l'enquêteur spécial, et les lois étrangères constituent un fait qui doit être prouvé par la partie qui y a recours. Même en l'absence de preuve que les crimes auxquels avait affaire l'enquêteur spécial constituaient bien des crimes en vertu de la loi italienne, la présomption selon laquelle les lois étrangères sont les mêmes que les lois canadiennes, à moins de preuve du contraire, justifie cette décision puisque, selon le libellé des jugements, les actes qui avaient donné lieu à l'instance tombent sous l'article 304 du Code pénal.

The expression "false and misleading" used conjunctively implies an element of mens rea, that is, that the information given must be knowingly erroneous.

The judgment of the Board was delivered by:

Miss J.V. Scott, chairman:

This is an appeal from an order of deportation made at Montreal, on October 7, 1968, by Special Inquiry Officer Michel Robert, against the appellant, Leornardo CARUANA, in the following terms:

- "(1) you are not a Canadian citizen
  - (2) you are not a person having acquired Canadian domicile; and that
  - (3) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada by reason of false and misleading information;
  - (4) in accordance with subsection (2) of section 19 of the Immigration Act you are subject to deportation."

The inquiry was held on August 25, 1967, August 13, 1968, and October 7, 1968 and was instituted as a result of a report pursuant to section 19 of the Immigration Act, and a direction pursuant to section 26 of that Act. These documents, filed as Exhibit "A" to the Minutes of Inquiry, are transcriptions by telex and read as follows:

"IMM MTL

24/8/67 - 9:55-2543

W.L. PEVERELLE TO IMMIG MTL

"REFERENCE YOUR REPORT DATED AUGUST 24, 1967, UNDER SECTION 19(1)(E)(IV) (VIII) OF THE IMMIGRATION ACT CONCERNING LEONARDO CARUANA WHO IS A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE WHO WAS A MEMBER OF A PROHIBITED CLASS AT THE TIME OF HIS ADMISSION TO CANADA, NAMELY, PARAGRAPH (D) OF SECTION 5 OF THE SAID ACT, PERSONS WHO HAVE BEEN CONVICTED OF OR ADMIT HAVING COMMITTED ANY CRIME INVOLVING MORAL TURPITUDE EXCEPT PERSONS WHOSE ADMISSION TO CANADA IS AUTHORIZED BY THE GOVERNOR IN COUNCIL, AND WHO CAME INTO CANADA OR REMAINS THEREIN BY REASON OF ANY FALSE OR

L'enquêteur spécial n'avait ni le pouvoir ni les preuves nécessaires pour faire subir un nouveau procès à M. Caruana pour les infractions dont il avait été accusé. Il avait devant lui la preuve irréfutable d'une condammation par les tribunaux étrangers pour un acte qui est un crime reconnaissable et identifiable selon la loi canadienne; il a donc eu raison de conclure que M. Caruana avait été trouvé coupable d'un crime aux termes de la loi sur l'Immigration.

L'expression conjonctive "false and misleading" implique un élément d'intention délictueuse, c'est-à-dire que les renseignements donnés doivent être sciemment erronés.

Le jugement de la Commission fut rendu par:

#### Mlle J.V. Scott, président:

Appel d'une ordonnance d'expulsion rendue à Montréal le 7 octobre 1968 par l'enquêteur spécial Michel Robert contre l'appelant, Leonardo Caruana. L'ordonnance est ainsi formulée:

- "(1) you are not a Canadian citizen:
  - (2) you are not a person having acquired Canadian domicile; and that
- (3) you are a person described under subparagraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada by reason of false and misleading information;
- (4) in accordance with subsection (2) of section 19 of the Immigration Act you are subject to deportation."

C'est à la suite de la réception d'un rapport prévu par l'article 19 de la Loi sur l'immigration et de l'émission d'un ordre prévu par l'article 26 de cette même loi que l'on a procédé à une enquête, laquelle a été tenue le 25 août 1967, le 13 août 1968 et le 7 octobre 1968. Ces documents, qui constituent la pièce "A" au procèsverbal de l'enquête, sont des transcriptions au téléscripteur formulées comme suit:

MISLEADING INFORMATION, OR OTHER FRAUDULENT OR IMPROPER MEANS, WHETHER EXERCISED OR GIVEN BY HIMSELF OR BY ANY OTHER PERSON. PURSUANT TO SECTION 26, I DIRECT THAT AN INQUIRY BE HELD."

"DATED AT OTTAWA, PROVINCE OF ONTARIO THIS 24th DAY OF AUGUST, 1967.

J.L. MANION,
ASSISTANT DIRECTOR, HOME BRANCH,
FOR DIRECTOR OF IMMIGRATION,
DEPARTMENT OF MANPOWER AND IMMIGRATION."

and

"MANPW IMM OTT

IMM MTL

TO THE DIRECTOR OF IMMIGRATION OTTAWA

PURSUANT TO SUBPARAGRAPH IV AND VIII OF PARAGRAPH (E) OF SUBSECTION (1) OF SECTION 19 OF THE IMMIGRATION ACT THIS IS A REPORT CONCERNING LEONARDO CARNANA A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE WHO WAS A MEMBER OF A PROHIBITED CLASS AT THE TIME OF HIS ADMISSION TO CANADA NAMELY SECTION 5(D) OF THE SAID ACT PERSONS WHO HAVE BEEN CONVICTED OF OR ADMIT HAVING COMMITTED ANY CRIME INVOLVING MORAL TURPITUDE EXCEPT PERSONS WHOSE ADMISSION TO CANADA IS AUTHORIZED BY THE GOVERNOR IN COUNCIL CAME INTO CANADA OR REMAIN THEREIN WITH A FALSE OR IMPROPERLY ISSUED PASSPORT VISA MEDICAL CERTIFICATE OR OTHER DOCUMENT PERTAINING TO HIS ADMISSION OR BY REASON OF ANY FALSE OR IMPROPER MEANS WHETHER EXERCISED OR GIVEN BY HIMSELF OR BY ANY OTHER PERSON

R.R. LEFEBVRE
IMMIGRATION OFFICER

MB-499 IMM MTL."

and in hanwriting on the bottom right-hand corner "23/8/67 4.30 MS-3 - 42183 P.T."

Mr. Caruana's counsel contested the validity of these documents at the inquiry, and again at the hearing of the appeal, arguing that their defects were such as to completely vitiate the inquiry. Their arguments before the Board on this point may be summarized as follows:

"IMM MTL

24/8/67 - 9:55-2543

W.L. PEVERELLE TO IMMIG MTL

"REFERENCE YOUR REPORT DATED AUGUST 24, 1967. UNDER SECTION 19(1)(E)(IV) AND (VIII) OF THE IMMIGRATION ACT CONCERNING LEONARDO CARUANA WHO IS A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE WHO WAS A MEMBER OF A PROHIBITED CLASS AT THE TIME OF HIS ADMISSION TO CANADA, NAMELY' PARAGRAPH (D) OF SECTION 5 OF THE SAID ACT, PERSONS WHO HAVE BEEN CONVICTED OR ADMIT HAVING COMMITTED ANY CRIME INVOLVING MORAL TURPITUDE EXCEPT PERSONS WHOSE ADMISSION TO CANADA IS AUTHORIZED BY THE GOVERNOR IN COUNCIL, AND WHO CAME INTO CANADA OR REMAINS THEREIN BY REASON OF ANY FALSE OR MISLEADING INFORMATION, OR OTHER FRAUDULENT OR IMPROPER MEANS' WHETHER EXERCISED OR GIVEN BY HIMSELF OR BY ANY OTHER PERSON. PURSUANT TO SECTION 26, I DIRECT THAT AN INQUIRY BE HELD."

"DATED AT OTTAWA, PROVINCE OF ONTARIO THIS 24th DAY OF AUGUST, 1967.

J.L. MANION,
ASSISTANT DIRECTOR, HOME BRANCH,
FOR DIRECTOR OF IMMIGRATION,
DEPARTMENT OF MANPOWER AND IMMIGRATION."

et

"MANPW TMM OTT

IMM TEL

TO THE DIRECTOR OF IMMIGRATION OTTAWA

PURSUANT TO SUBPARAGRAPH IV AND VIII OF PARAGRAPH (E) OF SUBSECTION (1) OF SECTION 19 OF THE IMMIGRATION ACT THIS IS A REPORT CONCERNING LEONARDO CARNANA A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE WHO WAS A MEMBER OF A PROHIBITED CLASS AT THE TIME OF HIS ADMISSION TO CANADA NAMELY SECTION 5 (D) OF THE SAID ACT PERSONS WHO HAVE BEEN CONVICTED OF OR ADMIT HAVING COMMITTED ANY CRIME INVOLVING MORAL TURPITUDE EXCEPT PERSONS WHOSE ADMISSION TO CANADA IS AUTHORIZED BY THE GOVERNOR IN

- Neither document is in writing as required by the relevant section of the Immigration Act;
- 2) neither document is signed;
- 3) the section 26 direction purports to emanate from J.L. Manion who had no authority to make it;
- 4) the report is "dated" Aug. 23/67 whereas the direction refers to a report apparently concerns one Leonardo Carnana.

Section 19(1) of the Act provides in part 'Where he has knowledge thereof an immigration officer... shall send a written report to the Director, with full particulars, concerning..." and here follow various categories of persons.

Section 26 of the Act provides:

"Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under Section 19 and where he considers that an inquiry is warranted, cause an inquiry to be held concerning the person respecting whom the report was made."

Section 6 of the Immigration Inquiries Regulations, SOR/67/621 provides:

"Where upon receipt of a report in respect of a person pursuant to section 19 of the Act, the Director causes an inquiry to be held concerning the person pursuant to section 26 of the Act, the direction causing the inquiry shall be in writing and shall set out the provisions of the Act or the Immigration Regulations that have occasioned the Director to cause an inquiry to be held."

It is clear from these sections that both the Section 19 report and the Section 26 direction must be "written" or "in writing". Both these documents in the case at issue were telex transcriptions and must be held to have been "written" or "in writing" within the clear meaning of Section 28(42) of the Interpretation Act, 16 Eliz. II, c.7: "'writing' or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in visible form" (italics mine).

Is there any requirement in the Act or Regulations requiring these documents to be signed? Dealing first with the Direction, neither Section 26 of the Act nor Section 6 of the Inquiries Regulations contains any such provision, but their combined effect is such as to lead to the irresistible conclusion that the Direction must contain some indication

COUNCIL CAME INTO CANADA OR REMAIN THEREIN WITH A FALSE OR IMPROPERLY ISSUED PASSPORT VISA MEDICAL CERTIFICATE OR OTHER DOCUMENT PERTAINING TO HIS ADMISSION OR BY REASON OF ANY FALSE OR MISLEADING INFORMATION FORCE STEALTH OR OTHER FRAUDULENT OR IMPROPER MEANS WHETHER EXERCISED OR GIVEN BY HIMSELF OR BY ANY OTHER PERSON

R.R. LEFEBVRE IMMIGRATION OFFICER

MB-499 IMM MTL.

suit l'inscription suivante, à la main, au coin inférieur droit:

"23/8/67 4.30 MS-3 - 42183 P.T."

Les conseillers juridiques de M. Caruana ont contesté la validité de ces documents à l'audition de l'appel, comme ils l'avaient fait à l'enquête, affirmant que les irrégularités qu'ils contenaient suffisaient à annuler l'enquête. Les arguments qu'ils ont soumis à la Commission sur ce point peuvent se résumer comme suit:

- Aucun des deux documents n'est écrit, comme l'exige l'article pertinent de la Loi sur l'immigration;
- 2) aucun des deux documents n'est signé;
- 3) l'ordre donné en vertu de l'article 26 semble venir de J.L. Manion, qui n'avait pas l'autorité nécessaire pour le donner;
- 4) le rapport est daté du 23 août 1967, alors que l'ordre porte sur un rapport en date du 24 août 1967 et de plus, le rapport vise un certain Leonardo Carnana.

L'article 19(1) de la loi stipule entre autres choses que "lorsqu'il en a connaissance, ... un fonctionnaire à l'immigration... doit envoyer au directeur un rapport écrit, avec des détails complets, concernant...", ce "concernant" portant sur diverses classes de personnes.

En vertu de l'article 26 de la loi:

"Sous la réserve de tout ordre ou de toutes instructions du Ministre, le directeur, sur réception d'un rapport écrit prévu par l'article 19 et s'il estime qu'une enquête est, as to its source, i.e. that it was in fact made by the Director or someone properly authorized to act on his behalf. Counsel for the appellant referred the Board to Section 64(1) of the Act, which reads:

"Every document purporting to be a deportation order, rejection order, warrant, order, summons, direction, notice or other document over the name in writing of the Minister, Director, Special Inquiry Officer, immigration officer or other person authorized under this Act to make such document is, in any prosecution or other proceeding under or arising out of this Act or the Immigration Appeal Board Act, admissible in evidence as prima facie proof of the facts contained therein, without proof of the signature or the official character of the person appearing to have signed the same, unless called in question by the Minister or some other person acting for him or Her Majesty." (Italics mine).

It is to be noted that this section, which is purely evidentiary - indeed it is found in the Act under the heading "Evidence" - does not require the documents specified therein to be signed; it simply provides that if these documents are "over the name in writing" of a designated official, such "signature" cannot be called in question, except by the Minister or someone acting for him or by Her Majesty. It appears clear from the wording of the section that, for the purposes of the section the "name in writing" is the "signature" of the officials specified in the section.

In the instant appeal, the Section 26 direction was filed as an Exhibit to the Minutes of Inquiry (Exhibit "A") as required by Section 7(b) of the Inquiries Regulations:

"Section 7. At the commencement of an inquiry in respect of a person, where applicable

(b) the direction referred to in Section 6 causing the inquiry to be held; shall be filed as an exhibit."

But was this direction "evidence" within the meaning of Section 64? Mr. Nadon argued strenuously that it could not be since to hold that it constituted prima facie proof on the merits would render the inquiry redundant and futile and would be contrary to the spirit and intent of the Act. Without deciding on this point, which was never an issue in this case, it must be held that the Direction was filed as evidence of one thing, namely that the Special Inquiry Officer has been required pursuant to section 26 to hold the inquiry, and in so far as "the facts contained therein" are relevant to that point, it is prima facie proof thereof. These facts include the "signature" and the "official character" of the person purporting to make it, - J.L. Manion, described in the Direction as "Assistant Director, Home Branch. For Director of Immigration, Department of Manpower and Immigration."

justifiée, doit faire tenir une enquête au sujet de la personne visée par le rapport."

L'article 6 du Règlement sur les enquêtes de l'immigration, DORS/67-621, stipule que:

"Lorsque le directeur, au reçu d'un rapport concernant une personne fait selon l'article 19 de la Loi, décide de faire tenir une enquête au sujet de ladite personne, conformément à l'article 26 de la Loi, l'ordre de tenir l'enquête doit être donné par écrit et doit faire mention des dispositions de la Loi ou du Règlement sur l'immigration aux termes desquelles le directeur a jugé bon d'ordonner la tenue d'une enquête."

Il est clair d'après ces articles que le rapport prévu par l'article 19 et l'ordre prévu par l'article 26 doivent être "écrit" ou "donné par écrit". Dans l'affaire en litige, ces deux documents étaient des transcriptions au téléscripteur et ils doivent être considérés comme étant "écrit" ou "donné par écrit" selon la signification évidente de l'article 28(42) de la loi d'Interprétation, 16 Eliz. II, c.7: "'écrit' ou tout terme ayant le même sens comprend les mots imprimés, dactylographiés, peints, gravés, lithographiés, photographiés ou représentés ou reproduits par tout mode de présentation ou de reproduction de mots sous une forme visible" (mots soulignés par l'auteur).

Y a-t-il dans la loi ou le Règlement quelque disposition qui exige que ces documents soient signés?

D'abord, en ce qui concerne l'ordre d'expulsion, ni l'article 26 de la loi ni l'article 6 du Règlement sur les enquêtes ne contiennent de disposition à cet effet; cependant, en réunissant ces deux articles, nous sommes forcés de conclure que l'ordre doit contenir quelque indication quant à sa provenance, c'est-à-dire qu'il doit y être indiqué qu'il a été donné par le directeur ou par une personne dûment autorisée à agir en son nom. Le conseiller juridique de l'appelant a renvoyé la Commission à l'article 64(1) de la loi, en vertu duquel:

"Tout document présenté comme étant une ordonnance d'expulsion, une ordonnance de rejet, un mandat, un ordre, une sommation, une directive, un visa ou autre document sous le nom écrit du Ministre, du directeur d'un enquêteur spécial, d'un fonctionnaire à l'immigration ou autre personne autorisée par la présente loi à établir un semblable document, constitue, dans toute poursuite ou autre procédure sous le régime de la présente loi ou de la loi sur la Commission d'appel de l'immigration ou en découlant, une preuve prima facie

Since the name "J.L. Manion" is "in writing" is "in writing" within the meaning of Section 28(42) of the Interpretation Act, it is a "signature" within the meaning of Section 64, and it may further be held to be a "signature" by ordinary jurisprudence in reference to which the case of Grondin v. Tisi and Turner 1912, 4 DLR 819; 41 Que S.C. 530 (C.A.) was cited by Me Nadon. There "signature" was defined as "the name of a person or something representing his name, written stamped or inscribed by himself or by someone else properly deputized, as sign of agreement or acknowledgment".

Reference may also be made to Aina v. Min. M. & I. (1969) 1 I.A.C. 46.

Counsel for the appellant argued that Mr. Manion had no authority to sign the Direction, which must be made by the Director pursuant to Section 26 of the Act. 'Director' is defined by the Immigration Act in the following terms(Section 2(e)):

" 'Director" means the Director of the Immigration Branch of the Department of Citizenship and Immigration or a person authorized by the Minister to act for the Director".

Mr. Manion signed the Direction "For Director of Immigration" and since this was his "official character" in signing the Direction, the provisions of Section 64 apply and it is not open to question by the appellant. In this regard, Me Nadon, filed during the hearing of the appeal true copy of the authorization of the Hon. J. Marchand, then Minister of Manpower and Immigration, dated 13 October 1965, naming, among others, J.L. Manion "to act for the Director of the Department of Manpower and Immigration".

Maîtres Blank and Pateras objected strenuously to the filing of this document, which indeed was put in during Me Nadon's argument and after the argument of counsel for the appellant. While such a practice is to be deplored, and the Board admitted the document under reserve, Section 7(2)(c) of the Immigration Appeal Board Act makes it clear that the Board has power to accept such evidence "at any time during a hearing". This section reads in part:

"Section 7(2) The Board ... may

(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

The word "hearing" is defined by Section 2(d) of the Immigration Appeal Board Act as meaning a further examination or inquiry conducted under the Immigration Act - a rather startling definition in the context - but it is clear in reading Section 7(2)(c) that the word is there used in the sense of "hearing of an appeal".

des faits y contenus et est recevable en preuve sans l'établissement de la <u>signature</u> ou du caractère officiel de la personne qui semble l'avoir signé à moins que le fait ne soit contesté par le Ministre ou par quelqu'autre personne agissant pour son compte ou pour sa Majesté." (mots soulignés par l'auteur.)

Il est à noter que cet article, qui ne se rapporte qu'à la preuve (il se trouve en effet dans la loi sous le titre "Preuve") n'exige pas que les documents qui y sont mentionnés soient signés; il prévoit seulement que si ces documents sont "sous le nom écrit" d'un certain agent officiel, cette "signature" ne peut être mise en cause que par le Ministre ou par quelqu'autre personne agissant pour son compte ou pour sa Majesté. Il semble clair d'après le libellé que pour les fins de l'article le "nom écrit" est la signature des agents officiels mentionnés.

Dans l'appel en instance l'ordre donné aux termes de l'article 26 a été déposé au procès-verbal de l'enquête (pièce "A") comme le prévoit l'article 7(b) du Règlement sur les enquêtes:

"Article 7. Au début d'une enquête concernant une personne, il faut, s'il y a lieu, déposer comme pièces à l'appui

(b) l'ordre mentionné à l'article 6 ordonnant la tenue de l'enquête."

Mais cet ordre constituait-il une preuve aux termes de l'article 64? M. Nadon a vigoureusement prétendu le contraire, soutenant que le fait de considérer cet ordre comme preuve prima facie quant au fond de l'affaire rendrait l'enquête vaine et superflue et serait contraire à l'esprit et à l'intention de la loi. Sans nous prononcer sur cet argument, qui n'a jamais été contesté dans cette affaire, nous devons conclure que l'ordre a été déposé comme preuve d'une seule chose, soit du fait que l'on avait ordonné à l'enquêteur spécial de procéder à une enquête en vertu de l'article 26; l'ordre constitue une preuve prima facie de ce fait dans la mesure où "les faits y contenus" s'y rapportent. Ces faits comprennent la "signature et le "caractère officiel" de la personne qui prétendait donner l'ordre, soit J.L. Manion qui, aux termes de l'ordre, serait "Assistant Director, Home Branch, For Director of Immigration, Department of Manpower and Immigration."

Puisque le nom "J.L. Manion" est "donné par écrit" aux termes de l'article 28(42) de la Loi d'interprétation, il constitue une signature aux termes de l'article 64; il peut aussi être considéré comme une signature selon une décision de jurisprudence ordinaire dans l'affaire Grondin v. Tisi et Turner 1912, 4 DLR 819; 41 Qué C.S. 530 (C.A.) cité par Me Nadon. On y définit "signature" comme étant "the name of a person or something representing his name, written stamped or inscribed by himself or by someone else properly deputized, as sign of agreement or acknowledgement."

The power given to the Board by this section allows it to depart from the usual practice of a conventional appeal court and points up its character as a Cour d'exception, so that hearing of appeals before it may be and sometimes are, more of the nature of a trial de novo than a true appeal.

The Board, therefore, has come to the conclusion that it cannot only accept, but can use in reaching its decision, the document of authorization filed by Me Nadon, complying with the requirements of the Canada Evidence Act, and Section 64 of the Immigration Act, and which in any event is only corroborative of the statement of official character already found in the Direction.

The Direction therefore, so far, satisfies the requirements of the relevant sections of the Act and Regulations, that is, it is in writing, identifiably made (or "signed") by the person authorized to make it, and setting out the provisions of the Act that "have occasioned the Director to cause an inquiry to be held". It makes reference, however, to a report "dated August 24, 1967" ... concerning Leonardo Caruana ..." A copy of the supposed report was produced as part of Exhibit "A" to the Minutes of Inquiry. An examination of this document shows that it bears a hand-written date 23/8/67, and therunder, 4.30 - presumably the time when it was either sent or received. Furthermore, it refers to one Leonardo Carnana or Carmana. The surname appears to have been "corrected" in handwriting but when or by whom does not appear.

There is no requirement in the Act that the Section 19 report be filed as an exhibit produced at an inquiry. Section 26 requires the Director, upon receiving a written report under Section 19 and when he considers that an inquiry is warranted to "cause an inquiry to be held concerning the person respecting whom the report was made". Whether the direction has to refer to the report is a moot point, but the direction in the instant case did, and inaccurately. The discrepancy in the date and the name raises a doubt as to whether Mr. Manion, for the Director, did in fact cause the inquiry to be held concerning the person respecting whom the report was made and this doubt is sufficient to invalidate the direction. It may be noted that the Minister sought to remedy this situation by filing a corrected report, and a copy of the original direction, (not a telex) over a year after the inquiry was commenced, in the course of a resumed hearing thereof. These documents, which were filed as Exhibit "J" (the direction) and Exhibit "K" to the Minutes of Inquiry, cannot be held to have any significance. Section 7 of the Inquiries Regulations enjoins the Special Inquiry Officer to file the direction as an exhibit "at the commencement of the inquiry" and Section 8 requires him to read it " at the commencement of the inquiry". The introduction of a corrected report, and the original of the direction in conformity therewith, half way through an inquiry and a year after it commenced, cannot be held to be in compliance with these sections.

It has been held that the Direction forming part of Exhibit "A" is invalid. But does this invalidate the inquiry?

La décision rendue dans l'affaire Aina v. Min. M. & I. (1969) 1 I.A.C. 46 a aussi été invoquée.

Aux dires du conseiller juridique de l'appelant, M. Manion n'était pas autorisé à signer l'ordre, qui doit être donné par le directeur, en vertu de l'article 26 de la loi. La Loi sur l'immigration donne la définition suivante de "directeur" (article 2(e):

" 'directeur' signifie le directeur de la division de l'Immigration au ministère de la Citoyenneté et de l'immigration, ou une personne autorisée par le Ministre à agir pour le directeur;"

M. Manion a signé l'ordre "For Director of Immigration" et, puisque tel était son "caractère officiel lorsqu'il a signé l'ordre, les dispositions de l'article 64 s'appliquent et ne peuvent être mises en cause par l'appelant. À cet égard Me Nadon a déposé à l'audition de l'appel une copie conforme de l'autorisation de l'honorable Jean Marchand, alors ministre de la Main-d'oeuvre et de l'Immigration, en date du 13 octobre 1965, et qui contenait entre autres noms, celui de J.L. Manion "to act for the Director of the Department of Manpower and Immigration".

Maîtres Blank et Pateras se sont énergiquement opposés au dépôt de ce document, qui fut quand même déposé au moment de l'intervention de Me Nadon, après la plaidoierie des conseillers de l'appelant. Quoique une telle façon de procéder soit déplorable et que la Commission ait formulé certaines réserves à la réception du document, l'article 7(2)(c) de la Loi sur la Commission d'appel de l'immigration autorise clairement la Commission à accepter de telles preuves "au cours d'une audition". Cet article contient la disposition suivante:

# "Article 7(2) La Commission ... peut

(c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie."

L'article 2(d) de la Loi sur la Commission d'appel de l'immigration définit "audition" comme étant un examen ou une enquête supplémentaire faite en vertu de la Loi sur l'immigration; cette définition est assez surprenante dans le contexte, mais il est clair à la lecture de l'article 7(2)(c) que le mot y est utilisé dans le sens de "l'audition d'un appel".

Les pouvoirs attribués à la Commission lui permettent de s'écarter de la procédure habituelle d'une cour d'appel conventionnelle et souligne son caractère de Cour d'exception, de sorte que l'audition des appels qu'elle doit connaître peut avoir le caractère d'un procès de novo plutôt que celui d'un véritable appel.

The sections of the Immigration Act dealing with the holding of inquiries are Section 11, Section 19 and Section 26, Section 20(2), Sections 23 and 24, and Sections 15 and 16 coupled with Section 25.

The actual conduct of an inquiry is dealt with in Sections 27, 28 and 29.

Section 11(2) provides:

"A Special Inquiry Officer has authority to inquire into and determine whether any person shall be allowed to come into Canada or to remain in Canada or shall be deported."

It will be noted that there is no restriction in this subsection.  $\label{eq:section}$ 

Section 26 empowers the Direction to "cause an inquiry to be held" upon receiving a report pursuant to Section 19.

Section 20(2) provides:

"Every person shall answer truthfully all questions put to him by an immigration officer at an examination and his failure to do so shall be reported by the immigration officer to a Special Inquiry Officer and shall, in itself, be sufficient ground for deportation where so ordered by the Special Inquiry Officer."

It would appear that upon receipt of a report under this section the Special Inquiry Officer has discretion as to whether to hold an inquiry or not.

Section 23 and 24 provide:

- "23. Where an immigration officer, after examination of a person seeking to come into Canada, is of opinion that it would or may be contrary to a provision of this Act or the regulations to grant admission to or otherwise let such person come into Canada, he may cause such person to be detained and shall report him to a Special Inquiry Officer."
- "24.(1) Where the Special Inquiry Officer receives a report under Section 23 concerning a person who seeks to come into Canada from the United States of America, Alaska or St.Pierre and Miquelon, he shall, after such further examination as he may deem necessary and subject to any regulations made in that behalf, admit such person or let hime come

La Commission en arrive donc à cette conclusion qu'en plus de pouvoir recevoir ce document d'autorisation déposé par Me Nadon, document qui répond aux exigences de la loi sur la Preuve au Canada et de l'article 64 de la loi sur l'Immigration, et qui de toute façon ne fait que confirmer la déclaration de caractère officiel contenue dans l'ordre, elle peut en tenir compte dans sa décision.

Jusqu'à ce point, l'ordre est donc conforme aux exigences des articles pertinents de la Loi et du Règlement: il est donné par écrit, identifié (ou signé) par la personne autorisée à le donner, et il fait mention des dispositions de la loi "aux termes desquelles le Directeur a jugé bon d'ordonner la tenue d'une enquête". Il mentionne cependant un rapport "dated August 24, 1967... concerning Leonardo Caruana...". La pièce à l'appui "A" au procès-verbal de l'enquête comprend une copie du prétendu rapport. L'examen du document révèle qu'il porte la date 23/8/67, écrite à la main, et en dessous la mention 4.30. Ces inscriptions indiquent probablement le moment de l'expédition ou celui de la réception du document. Par ailleurs, le document vise un certain Leonardo Carnana ou Carmana. Le nom semble avoir été "corrigé" à la main mais rien n'indique l'auteur ou le moment de cette correction.

Aucune disposition de la loi n'exige que le rapport prévu par l'article 19 soit déposé comme pièce à l'appui à l'enquête. En vertu de l'article 26, le directeur, sur réception du rapport prévu par l'article 19 et lorsqu'il estime qu'une enquête est justifiée, doit "faire tenir une enquête au sujet de la personne visée par le rapport", Il est douteux que l'ordre doive mentionner le rapport, mais en l'espèce il le mentionnait et d'une façon inexacte. L'erreur de nom et de date soulève un doute à savoir si M. Manion, au nom du directeur, a véritablement fait tenir une enquête au sujet de la personne visée par le rapport et ce doute suffit à invalider l'ordre. Il est à noter que le Ministre a tenté de remédier à cette situation en déposant un rapport corrigé et une copie de l'ordre original (non pas une transcription au téléscripteur) plus d'un an après le début de l'enquête au cours d'une reprise de l'audition. On ne peut accorder auxune importance à ces documents, déposés comme pièce à l'appui "J" 91'ordre) et "K" au procès-verbal de l'enquête. L'article 7 du Règlement sur les enquêtes veut que l'enquêteur spécial dépose l'ordre comme pièce à l'appui "au début d'une enquête" et l'article 8 exige qu'il la lise "au début de l'enquête". L'introduction d'un rapport corrigé et de l'ordre original qui lui était conforme au milieu de l'enquête, un an après le début, ne peut être considéré comme étant conforme à ces articles.

L'ordre faisant partie de la pièce "A" a été jugé nul. L'enquête se trouve-t-elle annulée de ce fait?

Les articles de la Loi sur l'immigration ayant trait à la tenue des enquêtes sont l'article 11, l'article 19, l'article 26, l'article 20(2), les articles 23 et 24 et les articles 15 et 16 joints à l'article 25. Les articles 27, 28 et 29 ont trait à la poursuite de l'enquête.

into Canada or make a deportation order against such person, and in the latter case such person shall be returned as soon as practicable to the place whence he came to Canada.

(2) Where the Special Inquiry Officer receives a report under section 23 concerning a person, other than a person referred to in subsection (1), he shall admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry under this Act."

Sections 15 and 16 deal with detention and arrest, and will be more fully discussed hereafter. Section 25 provides:

'Where a person is, pursuant to section 15 or 16, arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

Section 11(2), if read alone, would appear to give the Special Inquiry Officer jurisdiction to hold an inquiry notwithstanding the absence of or defect in the arrest, detention, report, or direction purporting to "activate" the inquiry. It is, however, an elementary rule of statutory interpretation that "construction is to be made of all the parts together, and not of one part only by itself" (Maxwell on Interpretation of Statutes, 11th Edition p. 27) and a further study of the Immigration Act as a whole leads to the conclusion that all the sections above quoted must be read together as setting out a scheme for the commencement and conduct of inquiries. There is therefore a condition precedent to instituting an inquiry, namely:

- 1) a section 23 report valid as to form, or
- 2) a section 26 direction valid as to form, or
- 3) a valid warrant of arrest, or
- 4) an actual arrest pursuant to section 16.

So long as one of these conditions precedent is complied with, the Special Inquiry Officer has jurisdiction to hold the inquiry in accordance with the authority given to him by section 11(2), and of course, in accordance with the requirements of section 11(3) and the Inquiries Regulations, which deal with the conduct of inquiries.

To hold otherwise would be to find that a Special Inquiry Officer has general authority to institute an inquiry and this would render section 24, section 26, and to a lesser degree section 25 of the Act, and the relevant sections of the Inquiries Regulations practically meaningless. That it cannot have been the intention of the legislature to make provision for certain documents or acts as purely internal administrative procedure not going to the jurisdiction of the Special Inquiry Officer is particularly clear when one examines section 26:

En vertu de l'article 11(2):

'Un enquêteur spécial a le pouvoir d'examiner la question de savoir si une personne doit être admise à entrer au Canada ou à y demeurer ou si elle doit être expulsée, et celui de statuer en l'espèce."

Il est à noter que cet article ne fait aucune restriction.

L'article 26 attribue à la direction le pouvoir de "faire tenir une enquête" sur réception d'un rapport prévu par l'article 19.

Selon l'article 20(2):

"Chaque personne doit donner des réponses véridiques à toutes les questions que lui pose, lors d'un examen, un fonctionnaire à l'immigration, et tout défaut de ce faire doit être signalé par ce dernier à un enquêteur spécial et constitue, en soi, un motif d'expulsion suffisant lorsque l'enquêteur spécial l'ordonne."

Il semblerait que sur réception d'un rapport prévu par cet article l'enquêteur spécial puisse procéder à une enquête ou pas, comme bon lui semble.

Les articles 23 et 24 stipulent que:

- "23. Lorsqu'un fonctionnaire à l'immigration, après avoir examiné une personne qui cherche à entrer au Canada, estime qu'il serait ou qu'il peut être contraire à quelque disposition de la présente loi ou des règlements de lui accorder l'admission ou de lui permettre autrement de venir au Canada, il doit la faire détenir et la signaler à un enquêteur spécial."
- "24.(1) Lorsque l'enquêteur spécial reçoit un rapport prévu à l'article 23 syr une personne qui cherche à venir au Canada des États-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon, il doit après enquête complémentaire qu'il juge nécessaire et sous réserve de tous règlements établis à cet égard, admettre cette personne ou lui permettre d'entrer au Canada ou rendre contre elle une ordonnance d'expulsion et, dans ce dernier cas, ladite personne doit, le plus tôt possible, être renvoyée au lieu d'où elle est venue au Canada.
  - (2) Lorsque l'enquêteur spécial reçoit un rapport prévu par l'article 23 sur une personne autre qu'une personne mentionnée au paragraphe (1), il doit l'admettre ou la laisser entrer au Canada, ou il peut la faire détenir en vue d'une enquête immédiate sous le régime de la présente loi.

"26. Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under section 19 and where he considers that an inquiry is warranted, cause an inquiry to be held concerning the person respecting whom the report was made."

The Director has discretion under this section to cause an inquiry to be held, or not, as he sees fit. To hold that a Special Inquiry Officer has authority under section 11(2) to hold an inquiry whether there is no such a direction, or where the direction is defective, would be to render section 26 completely nugatory.

Since it has been held that the Direction in the instant case was defective in form, the Special Inquiry Officer had no jurisdiction to institute the inquiry pursuant to such direction, and, had there been no other basis for the holding of the inquiry it would have been a nullity and the deportation order made as a result thereof would have been a nullity.

However, it appears from the record that the day before the inquiry, namely on August 24, 1967, Mr. Caruana was arrested pursuant to a warrant of arrest under section 15 of the Immigration Act. The actual warrant for arrest is not part of the record, but its existence was not contested by either party to the appeal and considerable argument as to its legality took place both at the inquiry and at the hearing of the appeal. It appears that this warrant was signed by L.R. Vachon, Regional Director.

Section 15(1) reads as follows:

"15. (1) The Minister may issue a warrant for the arrest of any person respecting whom an examination or inquiry is to be held or a deportation order has been made under this Act."

Exhibit "B" filed at the inquiry reads as follows:

'DELEGATION OF AUTHORITY UNDER THE IMMIGRATION ACT

Pursuant to the authority granted to me under the Immigration Act, I hereby authorize the persons who are, or in their absence, the persons who act for, the Regional Directors of Immigration in Halifax, Montreal, Toronto, Winnipeg, and Vancouver and the Chief Enforcement Officer and Chief Admissions Control Officer at Division Headquarters in Ottawa to act for the Director of Immigration of the Department of Manpower and Immigration.

J. Marchand (signed)
Minister of Manpower and Immigration

Dated at Ottawa

this 9th day of January 1967."

Les articles 15 et 16 portent sur l'arrestation et la détention et ils seront approfondis plus loin. L'article 25 prévoit ce qui suit;

"Lorsqu'une personne est arrêtée avec ou sans mandat, selon l'article 15 ou 16, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne."

L'article 11(2), considéré isolément, semblerait reconnaître à l'enquêteur spécial le pouvoir de procéder à une enquête en dépit de l'absence ou de l'irrégularité de l'arrestation, de la détention, du rapport ou de l'ordre à cet effet. Il y a cependant une règle fondamentale de l'interprétation des lois selon laquelle "construction is to be made of all the parts together, and not of one part only by itself" (Maxwell on Interpretation of Statutes, lle édition, p.27); une étude plus approfondie de la loi sur l'Immigration dans son ensemble nous porte à conclure que l'ensemble des articles cités cidevant établit une procédure pour initier et poursuivre une enquête. Il existe donc une condition préalable à l'établissement d'une enquête soit:

- le rapport prévu par l'article 23 en bonne et due forme ou
- 2) l'ordre prévu par l'article 26, en bonne et due forme ou
- 3) un mandat d'arrestation valide ou
- 4) une arrestation de fait aux termes de l'article 16.

Dès que l'une de ces conditions préalables est remplie, l'enquêteur spécial a le pouvoir de procéder à une enquête en vertu de l'autorité qui lui est attribuée par l'article 11(2) et, bien entendu, aux termes des exigences de l'article 11(3) et des dispositions du Règlement sur les enquêtes qui ont trait à la poursuite de l'enquête.

Toute autre position à ce sujet nous amènerait à reconnaître à l'enquêteur spécial l'autorité générale pour engager une enquête, ce qui enlèverait tout leur sens aux articles 24 et 26 et à une partie de l'article 25 de la loi, ainsi qu'aux articles pertinents du Règlement sur les enquêtes. L'article 26 révèle bien qu'il ne peut avoir été de l'intention du législateur de n'accorder à certains documents et à certains actes qu'une portée administrative interne sans rapport avec les pouvoirs de l'enquêteur spécial:

"26. Sous réserve de tout ordre ou de toutes instructions du Ministre, le directeur, sur réception d'un rapport écrit prévu par l'article 19 et s'il estime qu'une enquête est justifiée, doit faire tenir une enquête au sujet de la personne visée par le rapport."

En vertu de cet article, le directeur peut faire tenir une enquête ou ne pas le faire, selon ce qu'il juge bon. Attribuer à l'enquêteur spécial, en vertu de l'article 11(2), le pouvoir de procéder à

This document is a general delegation of authority by which, among others, the Regional Director in Montreal, which Mr. Vachon was, is authorized "to act for the Director of Immigration of the Department of Manpower and Immigration". Mr. Blank referred to section 71 of the Immigration Act, which reads:

"71. The Minister may authorize the Deputy Minister or the Director to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or the regulations and any such duty, power or function performed or exercised by the Deputy Minister or the Director under the authority of the Minister shall be deemed to have been performed or exercised by the Minister."

Mr. Blank argued that this section gave the Minister no power to delegate his authority under section 15(1), which in view of the wide wording of section 71 does not seem to be a valid argument, but it must be noted that the wording of Exhibit B makes it clear that the authority granted to Mr. Vachon under that document was "to act for the Director" and the Director has nothing to do with a warrant for arrest.

It is true that the Minister is authorized by section 71 to delegate his powers to the Director; Director is defined by section 2(e) of the Act as meaning: "the Director of the Immigration Branch of the Department of Manpower and Immigration or a person authorized by the Minister to act for the Director" (italics mine). When Messrs Blank and Pateras objected at the inquiry to the form of the warrant of arrest the Special Inquiry Officer stated (page 12, Minutes of Inquiry):

"So, on this objection raised by Me Blank, the Special Inquiry Officer would like to add this. In my opinion, the issuance of a warrant is not a delegated function, it is an administrative function. This authority is given clearly by Section 15(1) of the Immigration Act to the Minister of Immigration. Section 2 of paragraph 2 of same Section 15 gives, I believe, another authority to other persons concerning an order for detention of a person so I think we must consider to say function or authority separately. Article 71, says that the Minister may authorize the Deputy Minister or Director to perform or exercise any of the duties. The document which was exhibited to me and signed by Mr. J. Marchand, gives to Regional Directors of Immigration authority to issue warrants. Now the Act does not make as such any distinction in 71 between a Director or a Regional Director concerning Immigration, I must presume then that the word "director" in une enquête sans un ordre à cet effet ou lorsque l'ordre est irrégulier, enlèverait tout son effet à l'article 26.

Puisqu'il a été jugé en instance que l'ordre était irrégulier quant à sa forme, l'enquêteur spécial n'avait pas le pouvoir d'instituer une enquête aux termes de cet ordre et s'il n'y avait pas eu d'autres raisons pour procéder à l'enquête, l'enquête eût été nulle et l'ordonnance d'expulsion qui en est résulté, sans aucune valeur.

Il semble cependant que, d'après le dossier, M. Caruana ait été arrêté la veille de l'enquête, soit le 24 août 1967, par suite de l'émission d'un mandat d'arrestation en vertu de l'article 15 de la loi sur l'Immigration. Le mandat d'arrestation lui-même n'a pas été déposé au dossier, mais son existence n'a été mise en doute par ni l'une ni l'autre des parties à l'appel. Sa légalité a été considérablement contestée à l'enquête et à l'audition de l'appel. Ce mandat semble avoir été signé par le directeur régional L.-R. Vachon.

L'article 15(1) stipule que:

15.(1) Le Ministre peut émettre un mandat pour l'arrestation de toute personne à l'égard de laquelle un examen ou une enquête doit être tenue, ou à l'égard de laquelle une ordonnance d'expulsion a été rendue, en vertu de la présente loi.

La pièce à l'appui "B" déposée à l'enquête était ainsi formulée:

'DELEGATION OF AUTHORITY UNDER THE IMMIGRATION ACT

Pursuant to the authority granted to me under the Immigration Act, I hereby authorize the persons who are, or in their absence the persons who act for, the Regional Directors of Immigration in Halifax, Montreal, Toronto, Winnipeg, and Vancouver and the Chief Enforcement Officer at Division Headquarters in Ottawa to act for the Director of Immigration of the Department of Manpower and Immigration.

J. Marchand (signed)
Minister of Manpower and Immigration

Dated at Ottawa

this 9th day of January 1967."

Ce document constitue une délégation générale d'autorité qui permet à certaines personnes entre autres le directeur général de Montréal, M. Vachon, "to act for the Director of Immigration of the Department of Manpower and Immigration". M. Blank s'est reporté à l'article 71 de la Loi sur l'immigration selon lequel:

71 would include Directors of Immigration and more specifically, Mr. Vachon who is the Regional Director of Immigration for the province of Quebec.

#### BY Me HARRY BLANK (to Special Inquiry Officer)

I notice in the Act that there is a definition of the word "director" in 2(e).

#### BY SPECIAL INQUIRY OFFICER (to Me Harry Blank)

I must presume the word "Director" would still include other persons than the Director of Immigration, as defined in 2(2).

#### BY SPECIAL INQUIRY OFFICER (to Immigration Officer)

Mr. Pépin, you will file as Exhibit "B" the photocopy of the letter that is exhibited to us this morning.

#### BY IMMIGRATION OFFICER (to Special Inquiry Officer)

We did not see the letter, we saw the photocopy.

#### BY SPECIAL INQUIRY OFFICER

I will take the photocopy and produce it as Exhibit "B" being satisfied that, for the moment, that this document is a true photocopy of an original dated at Ottawa, this 7th day of January 1967.

Considering these arguments and these facts, I will maintain that the arrest of Mr. Caruana was properly made with a legal warrant duly issued by Mr. Vachon, Regional Director of Immigration."

In the Board's opinion, the Special Inquiry Officer was wrong in holding, in effect, that the word director in Section 71 includes Regional directors, because the plain wording of section 2(e) would seem to exclude such an interpretation.

No document was filed in respect of any delegation of authority by the Minister to the Director to act on his behalf, pursuant to section 71. But can the presumption of law enunciated by Coke: "Omnia praesumuntur legitimae facta donec probetur in contrarium" apply? Jowitt comments: "Where there is a question of official acts there is a rebuttable presumption that all necessary conditions, precedents and formalities have been complied with."

In Samejima v. The King, (1932) S.C.R. 640, Lamont, J. in the course of his reasons for judgment dealt with section 42 of the then Immigration Act, which read as follows:

"71. Le Ministre peut autoriser le sous-ministre ou le directeur à remplir et exercer les devoirs, pouvoirs et fonctions qu'il est ou qu'il peut être tenu de remplir ou d'exercer aux termes de la présente loi ou des règlements et tout devoir, pouvoir ou fonction rempli ou exercé par le sous-ministre ou par le directeur sous l'autorité du Ministre est réputé l'avoir été par le Ministre."

M. Blank a prétendu que cet article n'attribuait pas au Ministre le pouvoir de déléguer son autorité en vertu de l'article 15(1) ce qui, étant donné l'extension du libellé de l'article 71, ne semble pas être un argument valable; if faut cependant remarquer que le libellé du document qui constitue la pièce "B" autorise clairement M. Vachon "to act for the Director" et que le directeur n'a rien à voir avec l'émission d'un mandat d'arrestation.

Il est vrai que l'article 71 autorise le Ministre à déléguer ses pouvoirs au directeur; l'article 2(e) de la loi définit le directeur comme étant: "le directeur de la Division de l'immigration, au ministère de la Citoyenneté et de l'Immigration, ou une personne autorisée par le Ministre à agir pour le directeur;" (mots soulignés par l'auteur).

Lorsque Messieurs Blank et Pateras, au cours de l'enquête, ont contesté la forme du mandat d'arrestation, l'enquêteur spécial a déclaré ceci (procès-verbal de l'enquête, page 12):

"So, on this objection raised by Me Blank, the Special Inquiry Officer would like to add this. In my opinion, the issuance of a warrant is not a delegated function. This authority is given clearly by Section 15(1) of the Immigration Act to the Minister of Immigration. Section 2 of paragraph 2 of same Section 15 gives, I believe, another authority to other persons concerning an order for detention of a person so I think we must consider to say function or authority separately. Article 71, says that the Minister may authorize the Deputy Minister or Director to perform or exercise any of the duties. The document which was exhibited to me and signed by Mr. J. Marchand, gives to Regional Directors of Immigration authority to issue warrants. Now the Act does not make as such any distinction in 71 between a Director or a Regional Director concerning Immigration, I must presume then that the word "director" in 71 would include Directors of Immigration and more specifically, Mr. Vachon who is the Regional Director of Immigration for the province of Quebec.

- "42. Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.
- 2. Such Board of Inquiry or officer shall have the same powers and privileges, and shall follow the same procedure, as if the person against whom complaint is made were being examined upon application to enter or land in Canada and such person shall have the same rights and privileges as he would have if seeking to enter or land in Canada.
- 3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.
- 4. The Governor in Council may, at any time, order any such person found by a Board of Inquiry or examining officer to belong to any of the undesirable classes referred to in this Act to leave Canada within a specified period; such order may be in the form E in the schedule to this Act, and shall be in force as soon as it is served upon such person, or is left for him by any officer at the last-known place of abode or address of such person.
- 5. Any person rejected or deported only by reason of inability to comply with the provisions of any Order in Council, which has been rescinded, may be subsequently permitted to enter or land in Canada by a Board of Inquiry or officer in charge, on complying with the provisions of this Act, but any person rejected or deported by reason of any other cause under this Act or under the Opium and Narcotic Drug Act, or removed, expelled or deported under the authority of any Order in Council or other regulation made under the War Measures Act, shall not be permitted to enter or land in Canada without the consent of the Minister, and any person who enters or remains in or returns to Canada after such rejection or deportation contrary to the provisions of this section, or who refuses or neglects to leave Canada when ordered so to do by the Governor in Council, as provided by subsection four of this section, shall be guilty of an offence against this Act, and any person suspected of an offence under this section may forthwith be arrested and detained without a warrant by any officer for examination

### BY Me HARRY BLANK (to Special Inquiry Officer)

I notice in the Act that there is a definition of the word "director" in 2(e).

#### BY SPECIAL INQUIRY OFFICER (to Me Harry Blank)

I must presume the word "Director" would still include other persons than the Director of Immigration, as defined in 2(2)

# BY SPECIAL INQUIRY OFFICER (to Immigration Officer)

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## BY IMMIGRATION OFFICER (to Special Inquiry Officer)

We did not see the letter, we saw the photocopy.

#### BY SPECIAL INQUIRY OFFICER

I will take the photocopy and produce it as exhibit "B" being satisfied that, for the moment, that this document is a true photocopy of an original dated at Ottawa, this 7th day of January 1967.

Considering these arguments and these facts, I will maintain that the arrest of Mr. Caruana was properly made with a legal warrant duly issued by Mr. Vachon, Regional Director of Immigration."

La Commission estime que l'enquêteur spécial avait tort d'affirmer, en somme, que le mot "directeur" à l'article 71 comprend les directeurs régionaux, parce que le libellé de l'article 2(e) exclut une telle interprétation.

On n'a déposé aucun document ayant trait à une délégation d'autorité du Ministre au directeur lui permettant d'agir en son nom en vertu de l'article 71. Mais la présomption légale "Omnia praesumuntur legitimae facta donec probetur in contrarium", formulée par Coke, s'applique-t-elle ici? Selon le commentaire de Jowitt: "Where there is a question of official acts there is a rebuttable presumption that all necessary conditions, precedents and formalities have been complied with".

Dans l'affaire Samejima v. The King, (1932), S.C.R. 640, Lamont, J., mentionnait dans les raisons de la décision, l'article 42 de l'ancienne Loi sur l'immigration, qui était ainsi formulée:

as provided under section thirty-three of this Act, or may be prosecuted for such offence, and shall be liable on summary conviction to a fine not exceeding five hundred dollars and not less than fifty dollars, or to a term of imprisonment, and upon payment of the fine or after expiry of any sentence imposed for such offence may be again deported or ordered to leave Canada under this section.

6. In any case where deportation of the head of a family is ordered, all dependent members of the family may be deported at the same time; and in any case where deportation of a dependent member of a family is ordered on account of having become a public charge, and in the opinion of the Minister such circumstance is due to wilful neglect or nonsupport by the head or other members of the family morally bound to support such dependent member, then all members of the family may be deported at the same time."

#### The learned judge stated (page 645):

"Counsel for the appellant contended that jurisdiction to order the arrest of the appellant under this section depended upon the existence of the conditions precedent required by the statute, that is to say upon the receipt of a complaint from an officer under the Act or from a municipal official, and that in either case the complainant must give particulars of the act or omission which placed the immigrant in the prohibited or undesirable class; that there was no evidence that the complaint in this case had been received from any person specified in the section; that the order of the Deputy Minister would indicate that no particulars other than those contained in his order had been given, and, therefore, no jurisdiction on the part of the Deputy Minister to order the appellant's arrest had been shown, and jurisdiction would not be presumed. He further contended that as there was no jurisdiction to issue the order which set these proceedings in motion, every step taken subsequent to the order was invalid.

The objection here taken is, to my mind, a very serious one, for the jurisdiction of a Minister or his Deputy, under section 42, to take an immigrant into custody is conditioned upon a complaint being received from one of the persons specified therein. Parliament has not authorized the exercise of this jurisdiction on the complaint of an unknown person who might be an enemy or competitor or business rival of the immigrant, desirous of harassing. It is given only on the complaint of an officer or official, whose official position it may have been thought would warrant the inference that the complaint would not be made without knowledge, nor inspired by any but proper motives. It is established law that

- "42. Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such.
- 2. Such Board of Inquiry or officer shall have the same powers and privileges, and shall follow the same procedure, as if the person against whom complaint is made were being examined upon application to enter or land in Canada and such person shall have the same rights and privileges as he would have if seeking to enter or land in Canada.
- 3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister.
- 4. The Governor in Council may, at any time, order any such person found by a Board of Inquiry or examining officer to belong to any of the undesirable classes referred to in this Act to leave Canada within a specified period; such order may be in the form E in the schedule to this Act, and shall be in force as soon as it is served upon such person, or is left for him by any officer at the last-known place of abode or address of such person.
- 5. Any person rejected or deported only by reason of inability to comply with the provisions of any Order in Council, which has been rescinded, may be subsequently permitted to enter or land in Canada by a Board of Inquiry or officer in charge, on complying with the provisions of this Act, but any person rejected or deported by reason of any other cause under this Act or under the Opium and Narcotic Drug Act, or removed, expelled or deported under the authority of any Order in Council or other regulation made under the War Measures Act, shall not be permitted to enter or land in Canada without the consent of the Minister, and any person who enters or remains in or returns to Canada after such rejection or deportation contrary to the provisions of this section, or who refuses or neglects to leave Canada when ordered so to do by the Governor in Council, as provided by subsection four of this section, shall be guilty of an offence against this Act, and any person suspected of an offence under this section may forthwith be arrested and detained without a warrant by any officer for examination and deportation, as provided under section

jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

Following the reasoning in this case, the jurisdiction of Mr. Vachon to issue the warrant for arrest cannot be presumed, and there was no proof that he did in fact have such jurisdiction. The issuance of the warrant by an unauthorized person is not an "official act" and the maxim set out by Coke, above quoted, cannot apply. The warrant for the arrest of Mr. Caruana is therefore invalid.

Lagarde, J. in his Droit Pénal Canadien sets out the principle of criminal law that illegality of an arrest does not affect the jursidiction of a justice of the peace, Magistrate, or judge (R. v. Bourgeois, 92 C.C.C. 229, R. v. Benoit, 105 C.C.C. 185, Bodging v. Butcher 105 C.C.C. 368, Leachensky v. Christie (1947) A.C. 573). It must be pointed out that there are many cases going the other way.

In R. v. Bourgeois (supra) Hughes J. held: "If the defendant is present before the magistrate and the magistrate has jurisdiction over the offence charged, he has jurisdiction to proceed with the hearing no matter how illegal may have been the procedure which caused the defendant to be before him."

The case of R. v. Iaci (1925) 1 W.W.R. 304 (B.C.C.A.) is of interest. There Macdonald C.J.A. said: "It is trite law that a Court cannot be given jurisdiction by consent. There is no question here of the magistrate's general jurisdiction to try the person accused. The contention is that having been brought before the magistrate illegally, he had no jurisdiction to try him. This can only be sound if it be held that an information or a warrant is a condition precedent to jurisdiction ..."

As pointed out above there are various alternative conditions precedent to the Special Inquiry Officer's exercise of his jurisdiction to hold an inquiry, and one of these is a warrant of arrest valid on the face of it. The Immigration Act is a civil, not a criminal statute (Re Vergakis (1964), 49 W.W.R. 720). Arrest and the power of arrest, however, may be said to pertain more to criminal than to civil law, but even if one were to agree with the line of cases in criminal law which hold that illegality of an arrest does not affect jurisdiction, the philosophy behind those decisions, that the judge or magistrate has jurisdiction over the offense, cannot apply to the Special Inquiry Officer, who is seized of jurisdiction only when one of the conditions precedent set out in the Immigration Act is complied with.

Since the warrant for arrest in the instant case was invalid, any inquiry held as a result of that warrant is invalid, and a deportation order made following such an inquiry is null and void.

thirty-three of this Act, or may be prosecuted for such offence, and shall be liable on summary conviction to a fine not exceeding five hundred dollars and not less than fifty dollars, or to a term of imprisonment, and upon payment of the fine or after expiry of any sentence imposed for such offence may be again deported or ordered to leave Canada under this section.

6. In any case where deportation of the head of a family is ordered, all dependent members of the family may be deported at the same time; and in any case where deportation of a dependent member of a family is ordered on account of having become a public charge, and in the opinion of the Minister such circumstance is due to wilful neglect or non-support by the head or other members of the family morally bound to support such dependent member, then all members of the family may be deported at the same time."

Le savant juge affirmait ceci(page 645):

"Counsel for the appellant contended that jurisdiction to order the arrest of the appellant under this section depended upon the existence of the conditions precedent required by the statute, that is to say upon the receipt of a complaint from an officer under the Act or from a municipal official, and that in either case the complainant must give particulars of the act or omission which placed the immigrant in the prohibited or undesirable class; that there was no evidence that the complaint in this case had been received from any person specified in the section; that the order of the Deputy Minister would indicate that no particulars other than those contained in his order had been given, and, therefore, no jurisdiction on the part of the Deputy Minister to order the appellant's arrest had been shown, and jurisdiction would not be presumed. He further contended that as there was no jurisdiction to issue the order which set these proceedings in motion, every step taken subsequent to the order was invalid.

The objection here taken is, to my mind, a very serious one, for the jurisdiction of a Minister of his Deputy, under section 42, to take an immigrant into custody is conditioned upon a complaint being received from one of the persons specified therein. Parliament has not authorized the exercise of this jurisdiction on the complaint of an unknown person who might be an enemy or competitor or business rival of the immigrant, desirous of harassing him. It is given only on the complaint of an officer or official, whose official position it may have been thought would warrant the inference that the complaint would not be made without knowledge, nor inspired by any but proper motives. It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

Further support is given to this view by the statement of Lamont J. in Samejima v. R. (supra): "Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

We are still confronted with the question: was the inquiry held in respect of Mr. Caruana in fact valid, notwithstanding the invalidity of the section 26 Direction and the warrant for arrest?

It appears from the record that Mr. Caruana was in fact physically arrested on or about August 24, 1967. During the hearing of the appeal Mr. Blank made the following statements: (page 46, transcript of hearing)

#### "CHAIRMAN:

Mr. Blank, where is this warrant to arrest?

MR. BLANK:

I don't know. He was arrested by a warrant.

CHAIRMAN:

That was when? 24 August 1967?

MR. BLANK:

Yes, at noon.

CHAIRMAN:

And the inquiry commenced?

MR. BLANK:

December the 3rd was the first inquiry. There was bail granted about the 25th or 26th.

CHAIRMAN:

It commenced actually on the 25th of August?

MR. BLANK:

Yes, 25th of August and he was released on bail then. I may say he was incarcerated for almost 48 hours."

During that part of the inquiry which took place on August 25, 1967, there is a reference to bail (page 13, Minutes of Inquiry):

D'après le raisonnement suivi dans cette décision, on ne peut présumer du pouvoir de M. Vachon quant à l'émission d'un mandat d'arrestation et il n'y a pas de preuve qu'il détenait en fait un tel pouvoir. L'émission d'un mandat par une personne non autorisée ne constitue pas un "official act" et le principe formulé par Coke, que nous avons déjà cité, ne s'applique pas. Le mandat d'arrestation émis contre M. Caruana est par conséquent nul.

Lagarde, J. dans son <u>Droit Pénal Canadien</u> établit un principe de droit pénal selon lequel l'illégalité de l'arrestation n'affecte pas les pouvoirs d'un juge de la paix, d'un magistrat ou d'un juge (R. v. Bourgeois, 92 C.C.C. 229, R. v. Benoit, 105 C.C.C. 185, Bodging v. Butcher 105 C.C.C. 368, Leachensky v. Christie (1947) A.C. 573). Soulignons qu'un grand nombre de décisions vont dans le sens contraire.

Dans l'affaire R. v. Bourgeois (supra), Hughes, J., affirmait ceci: "If the defendant is present before the magistrate and the magistrate has jurisdiction over the offence charged, he has jurisdiction to proceed with the hearing no matter how illegal may have been the procedure which caused the defendant to be before him."

L'affaire R. v. Iaci (1925) 1 W.W.R. 304 (B.C.C.A.) est pertinente ici. Dans sa décision, Macdonald C.J.A. disait: "It is trite law that a court cannot be given jurisdiction by consent. There is no question here of the magistrate's general jurisdiction to try the person accused. The contention is that having been brought before the magistrate illegally, he had no jurisdiction to try him. This can only be sound if it be held that an information or a warrant is a condition precedent to jurisdiction..."

Or comme nous l'avons déjà dit , il existe diverses conditions dont l'une doit se réaliser pour que l'enquêteur spécial puisse exercer son pouvoir de procéder à une enquête. L'une de ces conditions préalables est l'émission d'un mandat d'arrestation valide quant à sa forme. La Loi sur l'immigration relève du droit civil, non du droit pénal (Re Vergakis(1964), 49 W.W.R. 720). On peut cependant soutenir que l'arrestation et le pouvoir d'arrestation relèvent davantage du droit pénal que du droit civil, mais même si l'on admet la série de décisions de droit pénal qui affirment que l'illégalité de l'arrestation n'affecte pas le pouvoir des juges, les principes sur lesquels se fondent ces décisions ne peuvent s'appliquer à l'enquêteur spécial, dont les pouvoirs ne peuvent être exercés qu'à partir du moment ou se réalise une des conditions préalables énumérées dans la loi sur l'Immigration.

Puisque le mandat d'arrestation émis dans l'affaire en instance était nul, toute enquête qui a pu avoir lieu par suite de ce mandat est invalide et l'ordonnance d'expulsion émise après cette enquête est nulle et non avenue. Cette opinion est par ailleurs conforme à la déclaration de Lamont, J., dans l'affaire Samejima v. R. (cité plus haut):

### "BY SPECIAL INQUIRY OFFICER (to Me Harry Blank)

I notice under Section 15, the Special Inquiry Officer has the power to make an order for detention of any such person before him. I will now order the detention of Mr. Leonardo Caruana who is present before me for this Inquiry for the moment, until I render another decision at a later stage on an application for bail which was made this morning by his counsels.

## BY Me HARRY BLANK (to Special Inquiry Officer)

I take exception in that in respect to the previous article, the Inquiry Officer cannot order the detention of a person who is not before him legally and if the warrant is illegal and certainly the subject is not before him legally and as such, he has no jurisdiction whatsoever over him."

The minutes of inquiry contain no record of any application for bail prior to the statement above quoted, so that it appears such application for bail took place before the inquiry commenced. There is no reason to doubt Mr. Blank's statement, as counsel to the appellant - and it was never contested - that Mr. Caruana spent some days or hours under arrest before the inquiry started.

# Section 16 of the Immigration Act reads as follows:

"16. Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

There appear to be no formalities required in connection with the administration of this section. It authorizes an arrest on suspicion. It is clear from the inquiry held in respect of Mr. Caruana that he was a person suspected of being a person referred to in subparagraph (viii) of paragraph (e) of subsection (1) of section 19. He could therefore, legally, be arrested pursuant to section 16 of the Act, and he was.

# Section 25 of the Act provides:

"25. Where a person is, pursuant to section 15 or 16, arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

"Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest."

Il reste à trancher la question suivante: l'enquête visant M. Caruana était-elle valide, en dépit de la nullité de l'ordre prévu par l'article 26 et du mandat d'arrestation?

D'après le dossier, il semble que M. Caruana fut en fait physiquement arrêté le 24 août 1967 ou vers cette date. Au cours de l'audition de l'appel, M. Blank fit des déclarations suivantes (page 46 au procès-verbal de l'audition):

#### "CHAIRMAN:

Mr. Blank, where is this warrant to arrest?

#### MR. BLANK:

I don't know. He was arrested by a warrant.

#### CHAIRMAN:

That was when? 24 August 1967?

#### MR. BLANK:

December the 3rd was the first inquiry. There was bail granted about the 25th or 26th.

#### CHAIRMAN:

It commenced actually on the 25th of August?

#### MR. BLANK:

Yes, 25th of August and he was released on bail then. I may say he was incarcerated for almost 48 hours."

Au cours de la partie de l'enquête qui eut lieu le 25 août 1967, on fit allusion à un cautionnement (page 13 au procès-verbal de l'enquête):

# BY SPECIAL INQUIRY OFFICER (to Me Harry Blank)

I notice under section 15, the Special Inquiry Officer has the power to make an order for detention of any any such person before him. I will now order the detention of Mr. Leonardo Caruana who is present before me for this inquiry for the moment, until I render

The inquiry respecting Mr. Caruana was commenced the day followwing his arrest, August 25, 1969, and the Special Inquiry Officer was seized with jurisdiction since a condition precedent to such jurisdiction - arrest pursuant to section 16 - had been satisfied. The inquiry was therefore a valid inquiry in the sense that Special Inquiry Officer Robert had jurisdiction to hold it, and it was held "forthwith" in accordance with the requirements of section 25.

Shortly after the commencement of the inquiry, Mr. Blank, who with Mr. Pateras, represented Mr. Caruana at the inquiry, made a demand for recusation. He stated (page 7, Minutes of Inquiry):

"I object to the Inquiry being held as I think that the Special Inquiry Officer should remove himself as a conference was held between the representative of the Immigration Department and the Special Inquiry Officer outside the presence of the subject and his counsels in relation to this case."

The Minutes of Inquiry show that throughout the inquiry, except on the day when the decision was rendered, when he was replaced by Mr. Roméo St-Louis, Mr. Jacques Pépin, an immigration officer, was present to "represent the Department". Immediately before formulating his demand for recusation, Me Blank said to Mr. Pépin (page 6, Minutes of Inquiry):

"You represent the Department in this case, in other words, you are representing the prosecution and you spoke  $1\frac{1}{2}$  hour with the Inquiry Officer, permit me to say that I do not think that you are a qualified counsel, you were discussing the case prior with the judge."

The Special Inquiry Officer's decision in respect of this demand for recusation was as follows:

"On this, I would like to say that the Special Inquiry Officer is not a Court as such, it is an Inquiry Officer according to the law and unless a serious possibility of partiality may be put in evidence, the Special Inquiry Officer has the duty to continue the Inquiry. Consequently, the demand for recusation is dismissed."

On this point Mr. Pateras argued at the hearing of the appeal, that although there was no evidence that Mr. Robert and Mr. Pépin "did anything" concerning Mr. Caruana's case during their conference, "if they do things behind closed doors we certainly cannot know what happens in that room but as the expression says Justice must not only be done, but must be seen to be done. And it doesn't seem that it was done. When the Inquiry Officer and one of the parties go off in another room for about three quarters of an hour and come back with the file after, it's very suspicious to say the least."

another decision at a later stage on an application for bail which was made this morning by his counsels.

### BY Me HARRY BLANK (to Special Inquiry Officer)

I take exception in that in respect to the previous article, the Inquiry Officer cannot order the detention of a person who is not before him legally and if the warrant is illegal and certainly the subject is not before him legally and as such, he has no jurisdiction whatsoever over him."

Le procès-verbal de l'enquête ne contient aucune pièce ayant trait à une demande de cautionnement antérieure à la déclaration citée ci-devant, ce qui laisse supposer que c'est avant le début de l'enquête que cette demande de cautionnement a été déposée. Il n'y a pas de raison de mettre en doute la déclaration de M. Blank, en tant que conseiller juridique de l'appellant, selon laquelle M. Caruana a passé quelques jours ou quelques heures en état d'arrestation avant le début de l'enquête. Cette déclaration n'a d'ailleurs pas été contestée.

L'article 16 de la Loi sur l'immigration est rédigé comme suit:

"16. Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, ainsi que tout fonctionnaire à l'immigration, peuvent, sans l'émission d'un mandat, d'une ordonnance ou de directives pour l'arrestation ou la détention, arrêter et détenir aux fins d'enquête et d'expulsion, ou en vue des deux à la fois, toute personne qui, pour des motifs raisonnables, est soupçonnée d'être une personne mentionnée au sousalinéa (vii), (viii), (ix) ou (x) de l'alinéa (e) du paragraphe (1) de l'article 19."

Il ne semble pas y avoir de procédure obligatoire d'établie en ce qui a trait à l'application de cet article. Il permet l'arrestation pour cause de suspicion. Il est incontestable d'après les résultats de l'enquête au sujet de M. Caruana que celui-ci pouvait être soupçonné d'être une personne à laquelle s'applique le sous-alinéa (viii) de l'alinéa (e) du paragraphe (l) de l'article 19. On pouvait donc l'arrêter légalement en vertu de l'article 16 de la loi, ce qui fut fait.

En vertu de l'article 25 de la loi:

"25. Lorsqu'une personne est arrêtée avec ou sans mandat, selon l'article 15 ou 16, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne."

The Board dealt with an analogous situation in Turpin v. Minister of Manpower and Immigration, (1969) 1 I.A.C. 1. There the Special Inquiry Officer had access to certain allegedly irrelevant and prejudicial material in his file, which was not produced in evidence at the inquiry. After examining the powers and duties of a Special Inquiry Officer, and finding that he is not a judge, though he has certain limited judicial functions, the Board held that "the mere possibility of access to irrelevant or prejudicial evidence by the deciding official (in this case the Special Inquiry Officer), does not automatically invalidate a deportation order, notwithstanding the Bill of Rights. The facts of each case must be examined and in the present case there is no evidence of any prejudice whatever to Mr. Turpin arising out of the fact that the Special Inquiry Officer had access to the file..."

In the instant case, both Mr. Robert and Mr. Pépin were immigration officials. During the inquiry, they both questioned Mr. Caruana. There is nothing in the Immigration Act or the Regulations to prevent this. A Special Inquiry Officer is no more than a quasi-judicial officer, and while he must of course act "judicially" the mere presence at, and active participation in, an inquiry, of another immigration official, with whom the Special Inquiry Officer may have conferred before or even during the course of the inquiry, does not automatically prejudice the position of the subject of the inquiry to such a degree as to invalidate the inquiry. In this case, there is no evidence whatsoever that Mr. Caruana suffered any prejudice by reason of the preliminary conference between Messrs. Pépin and Robert.

It may be added that the demand for recusation was presumably made pursuant to section 234 of the Québec Code of Civil Procedure. This Code cannot be held to apply to proceedings under the Immigration Act, and in any event the relevant section clearly refers to "a judge".

Turning to the merits of this appeal, the relevant facts are as follows:

Leonardo Caruana is a 48 year old citizen of Italy, married with 3 children, who entered Canada as a non-immigrant visitor on September 16, 1966, and was granted a temporary stay of one month. He has two brothers who are landed immigrants in Canada, residing in Montreal. On October 12, 1966, he submitted an application for permanent residence in Canada (Exhibit F of the Minutes of Inquiry) wherein, in response to the question (Box 13) "Have you or has any member of your family suffered from mental illness, tuberculosis, or been convicted of a criminal offence, refused admission or deported from Canada?" He replied "My brother Giuseppe denied admission after my daughter (this probably should read "brother") applied for him."

On August 24, 1967, for some reason Mr. Caruana was required to sign another application for permanent residence, which was backdated to October 12, 1966. This application was in the handwriting

L'enquête au sujet de M. Caruana commença le lendemain de son arrestation, le 25 avril 1969, et l'enquêteur spécial pouvait exercer ses pouvoirs puisque l'une des conditions préalables à ces pouvoirs s'était réalisée, soit l'arrestation en vertu de l'article 16. L'enquête était donc valide en ce sens que l'enquêteur spécial Robert avait les pouvoirs nécessaires pour y procéder et qu'elle fut tenue "immédiatement" aux termes des dispositions de l'article 25.

Peu après le début de l'enquête, Me Blank, qui avec M. Pateras représentait M. Caruana, formulait une demande de récusation. Il déclarait ceci (page 7 au procès-verbal de l'enquête):

"I object to the Inquiry being held as I think that the Special Inquiry Officer should remove himself as a conference was held between the representative of the Immigration Department and the Special Inquiry Officer outside the presence of the subject and his counsels in relation to this case."

Le procès-verbal de l'enquête indique la présence tout au long de l'enquête de M. Jacques Pépin, fonctionnaire à l'immigration qui représentait le Ministère ("represent the Department"), excepté le jour où la décision fut rendue. Il fut alors remplacé par M. Roméo St-Louis. Immédiatement avant sa demande de récusation, Me Blank avait adressé ces paroles à M. Pépin (page 6 au procès-verbal de l'enquête):

"You represent the Department in this case, in other words, you are representing the prosecution and you spoke 1½ hour with the Inquiry Officer, permit me to say that I do not think you are a qualified counsel, you were discussing the case prior with the judge."

La décision de l'enquêteur spécial quant à cette demande fut la suivante:

"On this, I would like to say that the Special Inquiry Officer is not a court as such, it is an Inquiry Officer according to the law and unless a serious possibility of partiality may be put in evidence, the Special Inquiry Officer has the duty to continue the Inquiry. Consequently the demand for recusation is dismissed."

Sur cette question, M. Pateras a soutenu à l'appel que même si rien ne prouve que M. Robert et M. Pépin aient fait quoi que ce soit, ("did anything") en ce qui a trait à l'affaire de M. Caruana au cours de leur entretien, "if they do things behind closed doors we certainly cannot know what happens in that room but as the expression says justice must not only be done, but must be seen to be done. When the

of Mr. Gaston Hamel, Immigration Officer, who testified to this effect at the hearing of the appeal, when he appeared as a witness at the request of the Board. The reply to question 13, written by Mr. Hamel and initialled "L.C.", is given: "Myself - No. My brother Giuseppe was denied admission." There is no certification of interpretation on this document, but exhibit H to the Minutes of Inquiry, a statutory declaration signed by Mr. Caruana the same day, August 24, 1967, bears the declaration of the interpreter, Giuseppe Cuffaro, a friend of Mr. Caruana. This declaration is a printed form, and in reply to the question (# 1) "Have you ever been convicted of a crime or offence?", the reply "No" is found in handwriting.

Evidence adduced at the inquiry in the form of certified true copies of various judgments by Italian courts shows that on June 14, 1952, in the Prefecture of Castelvetrano, Mr. Caruana was condemned to a fine of 5000 lires and a further fine of 5900 lires for certain offenses in respect of Social Insurance. Nothing hinges on this; it was never seriously argued at the inquiry or at the hearing of the appeal, and may be ignored.

On October 20, 1962, in Cattolica Eraclea, Mr. Caruana was condemned to a fine of 20,000 lires for an offense under Art. 116 of the Royal Decree of 21-12-1933 No. 1736, for having issued a cheque on the Bank of Sicilia which was not covered by funds and was dishonoured. This judgment bears the heading "Penal decree (Art. 506 and 507 of the Code of Penal Procedure)".

A similar condemnation for a similar offense was made by the Court of Agrigento on 28 May 1962, the fine imposed being 50,000 lires. This judgment does not refer to the royal decree aforementioned, but states (in translation) "it was just to inflict this monetary sentence due as per Art. 506 and 507 of the Code of Penal Procedure."

The Special Inquiry Officer came to the conclusion that these last two "condemnations" were convictions for a criminal offence "in that they are rendered under the Code of Penal Procedure and that they conclude that a penalty be imposed" (page 50, Minutes of Inquiry). In the Board's opinion, the Special Inquiry Officer was right in reaching this conclusion. At the hearing of the appeal an expert witness as to Italian law, Me Sergio Tucci, testified on behalf of the appellant. He was undoubtedly called in an endeavour to prove that the "condemnations" referred to were not crimes by Italian law; unfortunately his evidence had the opposite effect. Questioned by Mr. Pateras (p. 13ff transcript of hearing of appeal):

"Q. Now, with respect to the cheques, the two judgments for issuing NSF cheques, could you tell us under what law these judgments are based?

A. The first two judgments, the one dated October 20 and May 28, 1962, are rendered upon Article 116 of the Royal

Inquiry Officer and one of the parties go off in another room for about three quarters of an hour and come back with the file after, it's very suspicious to say the least."

La Commission s'est déjà trouvée devant une situation semblable dans l'affaire Turpin c. Ministère de la Main-d'oeuvre et de l'Immigration, (1969) l I.A.C. l. Dans ce cas l'enquêteur spécial avait eu accès à certains éléments non pertinents et préjudiciables dans son dossier, éléments qui n'avaient pas été présentés comme preuves à l'enquête. Après avoir étudié les pouvoirs et les responsabilités de l'enquêteur spécial, la Commission avait conclu qu'il n'était pas un juge, même s'il exerçait certaines fonctions judiciaires restreintes, et elle avait décidé que "the mere possibility of access to irrelevant or prejudicial evidence by the deciding official (in this case the Special Inquiry Officer), does not automatically invalidate a deportation order, notwithstanding the Bill of Rights. The facts of each case must be examined and in the present case there is no evidence of any prejudice whatever to Mr. Turpin arising out of the fact that the Special Inquiry Officer had access to the file..."

Dans l'instance, M. Robert et M. Pépin étaient tous les deux des fonctionnaires à l'immigration. Au cours de l'enquête tous les deux ont interrogé M. Caruana. La Loi sur l'immigration et le Règlement ne s'opposent en rien à cette façon de faire. Un enquêteur spécial n'est rien à cette façon de faire. Un enquêteur spécial n'est rien de plus qu'un agent quasi-judiciaire et, même s'il doit agir en tant que juge ("judicially"), la seule présence ou la participation à l'enquête d'un autre fonctionnaire à l'immigration, avec lequel il se serait entretenu avant ou au cours de l'enquête, ne nuit pas nécessairement à la position du sujet de l'enquête à un degré tel qu'il faille annuler l'enquête. Dans le cas qui nous concerne, absolument rien ne prouve que M. Caruana a eu à subir quelque tort à cause de la rencontre préliminaire entre messieurs Pépin et Robert.

Ajoutons que l'on a voulu fonder la demande de récusation sur l'article 234 du Code de procédure civile du Québec. Ce Code ne peut s'appliquer aux procédures qui tombent sous la loi sur l'Immigration et, de toute façon, l'article en question s'applique expressément à "un juge".

Quant au fond de l'appel, les faits pertinents sont les suivants:

Leonardo Caruana est un citoyen de l'Italie, âgé de 48 ans, marié et père de 3 enfants. Il est entré au Canada comme visiteur non immigrant le 16 septembre 1966 et on lui accorda un permis de séjour temporaire d'un mois. Il a deux frères qui sont des immigrants reçus au Canada et qui demeurent à Montréal. Le 12 octobre 1966 il a déposé une demande de résidence permanente au Canada (pièce à l'appui "F" au procès-verbal de l'enquête). À la question 13 au formulaire de demande, "Have you or has any member of your family suffered from mental illness, tuberculosis, or been convicted of a criminal offence, refused admission

Decree of December 21, 1933, number 1736. I brought you an extract from this particular law and Article 116 which I just referred to.

- Q. An extract from what?
- A. It is an extract from the Appendix to the Civil Code. this is not technically a criminal offence in this sense, it provides for the penalty of between 400 to 40,000 liras for issuing NSF cheques and also for passing such cheques or issuing a cheque without the authorization of the person who is entitled to give orders under the agreement with the bank.
- Q. Now, was this law -- this law is an Appendix to the Civil Code -- you show me a photostat copy of a document which at least appears to be page 550 ...
- A. 551 -- Article 116.
- Q. I read on top: "Codice Civile". Is this law considered a --- I read "Appendice Codice Civile". Is this law considered a criminal law in Italy?
- A. Well, you have asked me in particular to give you my opinion as to whether this was a crime involving moral turpitude. This is not a crime involving moral turpitude..

#### CHAIRMAN:

- Q. Is it a crime?
- A. Well of course every time a person infringes the law it is a crime in this sense, technically. Now, there are various crimes. In Italy there is only one term: reato which covers --- in the English language would be the equivalent of criminal offences and lesser offences.
- Q. Is this a reato?
- A. Technically, it would be a reato, yes.
- Q. What category?
- A. Well it would be a minor reato -- like administrative type.

#### Me PATERAS:

- Q. Now, do I understnad that the Italian Law has something similar to our criminal articles on fraud?
- A. No, there is no provision, not that I know of, of a Canadian Law equivalent to this disposition here. As a matter of fact, in Italy the issuing of a cheque without funds at the bank is considered a crime of this nature and at the time of presentation if I may add this, if at

or deported from Canada?", il a répondu ce qui suit: 'My brother Giuseppe denied admission after my daughter (il s'agit probablement plutôt de son frère) applied for him".

Le 24 août, pour une raison quelconque, M. Caruana a été obligé de signer une autre demande de résidence permanente, qui avait été antidatée au 12 octobre 1966. Cette demande était de l'écriture de M. Gaston Hamel, fonctionnaire à l'immigration, qui a déposé à cet effet à l'audition de l'appel lorsqu'il a témoigné à la demande de la Commission. La réponse à la question 13, de la main de M. Hamel et paraphée "L.C.", est la suivante: 'Myself - No. My brother Giuseppe was denied admission". Ce document ne porte pas de certification d'interprétation mais la pièce "H" au procès-verbal de l'enquête, une déclaration statutaire signée par M. Caruana le même jour, 24 août 1967, porte la déclaration de l'interprète, Giuseppe Cuffaro, un ami de M. Caruana. Cette déclaration est un formulaire imprimé et en réponse à la question l, "Have you ever been convicted of a crime or offence?" le mot 'No" se trouve écrit à la main.

Les preuves apportées à l'enquête, consistant en des copies conformes certifiées de divers jugements prononcés par des tribunaux italiens, démontrent que le 14 juin 1952, dans la préfecture de Castelvetrano, M. Caruana a été condamné à une amende de 5,000 lires et à une autre amende de 5,900 lires pour certains délits en rapport à l'assurance sociale. Ce fait est sans importance; il ne fut jamais sérieusement contesté, ni à l'enquête, ni à l'enquête, ni à l'audition de l'appel, et on peut le passer sous silence.

Le 20 octobre 1962, à Cattolica Eraclea, M. Caruana fut condamné à une amende de 20,000 lires pour une infraction à l'article 116 du Décret royal du 21/12/1933 nº 1736; il avait tiré un chèque sur la Banque de Sicile, chèque pour lequel il n'avait pas suffisamment de fonds et qui ne fut pas honoré. Ce jugement porte le titre: "Penal decree (Art. 506 and 507 of the Code of Penal Procedure)".

Le 28 mai 1962, la cour d'Agrigente le condamma pour une infraction semblable à une amende de 50,000 lires. Ce jugement ne mentionne pas le décret royal dont il est fait état plus haut mais il déclare ceci (en traduction): "It was just to inflict this monetary sentence due as per Art. 506 and 507 of the Code of Penal Procedure".

L'enquêteur spécial en est arrivé à la conclusion que ces deux derniers jugements constituaient des condamnations pour infractions criminelles "in that they are rendered under the Code of Penal Procedure and that they conclude that a penalty be imposed" (procès-verbal de l'enquête, page 50). De l'avis de la Commission, les conclusions de l'enquêteur spécial sont justes. À l'audition de l'appel, un expert en droit italien, Me Sergio Tucci, est venu témoigner en faveur de l'appelant. Il fut sans doute convoqué dans le but de prouver que les"condamnations" dont il fait état ne constituaient pas des crimes en vertu des lois italiennes. Il fut interrogé par M. Pateras (p. 13 ss. au procès-verbal de l'audition de l'appel):

time of presentation the funds are otherwise disposed, even for a good reason, the person issuing the cheque would still be subject to this penalty.

- Q. I see. Now, is there a difference with respect to the criminal procedure of what you said "reato" and the criminal procedure, I am speaking of a crime, and the procedure for an offence such as this one. In other words is there a trial?
- A. You mean the proceedings whereby a person has committed an effraction is going to trial?
- Q. Yes?
- A. Yes, under the Italian law there are three types of proceedings. There is the equivalent of indictment and there is a second proceeding which is the equivalent of our summary conviction and then there is a third type, and as a matter of fact this is the type that was applied in the three judgments, by decree. It means that the magistrate only reads the document that is brought before him and on that basis renders the judgment. Now, that is provided in Section 506 and Section 507 of the Italian Code of the Criminal Procedures and I brought you an extract of that also. If you would like to read it.
- Q. Would you produce these extracts, both of them, as exhibits?

#### CHAIRMAN:

The extract from the Appendix to the Civil Code will be Exhibit A and Sections 506 and 507 of the Code of the Criminal Procedures will be Exhibit B.

#### WITNESS:

Now, may I add this in order to clarify what this "giudizio per decreto" means. It actually be applied in cases wherein the person accused could be subject to prison or detention and all cases in which the penalty of imprisonment would not be applicable. Then the judge can go by giudizio per decreto.

- Q. So, if I understand well these three judgments referred to, Exhibit I, that were produced at the special inquiry, they all proceeded by this decree?
- A. Exactly.
- Q. And the judge would not be entitled to proceed by decree if the person would be subject to imprisonment?
- A. Correct, exactly.

''Q. Now, with respect to the cheques, the two judgments for issuing NSF cheques, could you tell us under what

law these judgments are based?

A. The first two judgments, the one dated October 20 and May 28, 1962, are rendered upon Article 116 of the Royal Decree of December 21, 1933, number 1736. I brought you an extract from this particular law and Article 116 which I just referred to.

- Q. An extract from what?
- A. It is an extract from the Appendix to the Civil Code. This is not technically a criminal offence in this sense, it provides for the penalty of between 400 to 40,000 liras for issuing NSF cheques and also for passing such cheques or issuing a cheque without the authorization of the person who is entitled to give orders under the agreement with the bank.
- Q. Now, was this law -- this law is an Appendix to the Civil Code -- you show me a photostat copy of a document which at least appears to be page 550 ...
- A. 551 -- Article 116.
- Q. I read on top: "Codice Civile". Is this law considered a --- I read "Appendice Codice Civile". Is this law considered a criminal law in Italy?
- A. Well, you have asked me in particular to give you my opinion as to whether this was a crime involving moral turpitude. This is not a crime involving moral turpitude...

#### CHAIRMAN:

- Q. Is it a crime?
- A. Well of course every time a person infringes the law it is a crime in this sense, technically. Now, there are various crimes. In Italy there is only one term: reato which covers --- in the English language would be the equivalent of criminal offences and lesser offences.
- Q. Is this a reato?
- A. Technically, it would be a reato, yes.
- Q. What category?
- A. Well it would be a minor reato -- like administrative type.

#### Me PATERAS:

Q. Now, do I understand that the Italian Law has something similar to our criminal articles on fraud?

- Q. Now, in such --- in rendering such judgments, is there a trial, is there a proceeding before the judge, "un débat" as we call it?
- A. There is a summons which is sent to the defendant and after that, on the date fixed, the judge renders judgment on the basis of the written evidence before him. If it is a NSF cheque, that is sufficient and it will be rendered on that.
- Q. Now, am I to understand that if I issue a cheque with funds in the bank and for some reason let's say the cheque is passed only a week after, at which time by error or omission there is not sufficient fund, would the fact that it was given in good faith still renders a person liable under this decree?
- A. Yes, it would. Every time a bank has to return an NSF cheque it has to inform the judicial authorities.
- Q. Now, with respect to the other judgment, the last judgment, could you tell us more about it? What type of judgment was it? I know it's the same Decree?
- A. It's under the Italian Social Laws. There is an institute in Italy which collects deductions made at source, contributions made by the employer towards certain funds to which the employee is entitled to and the keeping of books and so on. It is an offence of this type.
- Q. Would it be similar to our collective agreement --- Collective Agreement Act in the Province of Quebec?
- A. Yes, it would be under Social Law, yes.
- Q. Now, under this law, the Social law, is the mere fact of making an omission, for example even if you forget to make an entry or you forget to pay or make payment on time such as you have it on income tax deductions at source, say the lst of the month, you are liable to fine. Is this similar?
- A. If it is not similar it is almost the same.

#### CHAIRMAN:

- Q. Did you say that the word "reato" may be translated as "crime"?
- A. Yes, it may be translated as "crime" as "misdemeanour" or an offence in general.
- Q. And it includes all three, crimes disdemeanour and offence?
- A. Yes.

- A. No, there is no provision, not that I know of, of a Canadian Law equivalent to this disposition here. As a matter of fact, in Italy the issuing of a cheque without funds at the bank is considred a crime of this nature and at the time of presentation if I may add this, if at time of presentation the funds are otherwise disposed, even for a good reason, the person issuing the cheque would still be subject to this penalty.
- Q. I see. Now, is there a difference with respect to the criminal procedure of what you said "reato" and the criminal procedure, I am speaking of a crime, and the procedure for an offence such as this one. In other words is there a trial?
- A. You mean the proceedings whereby a person has committed an effraction if going to trial?
- Q. Yes?
- A. Yes, under the Italian law there are three types of proceedings. There is the equivalent of indictment and there is a second proceeding which is the equivalent of our summary conviction and then there is a third type, and as a matter of fact this is the type that was applied in the three judgments, by decree. It means that the magistrate only reads the document that is brought before him and on that basis renders the judgment. Now, that is provided in Section 506 and Section 507 of the Italian Code of the Criminal Procedures and I brought you an extract of that also. If you would like to read it.
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#### WITNESS:

Now, may I add this in order to clarify what this "giudizio per decreto" means. It actually cannot be applied in cases wherein the person accused could be subject to prison or detention and all cases in which the penalty of imprisonment would not be applicable. Then the judge can go by giudizio per decreto.

- Q. So, if I understand well these three judgments referred to, Exhibit I, that were produced at the special inquiry they all proceeded by this decree?
- A. Exactly.

- Q. What does the Italian word "IMPUTATO" mean?
- A. Accused. Prévenu en français."

### Cross examined by Me Nadon (p. 17 ff)

- 'Q. Les deux articles, l'article 116 entre autre, du décret royal, est-ce que l'on peut les considérer comme étant de nature criminelle?
- R. Comme je viens d'expliquer mon point de vue, d'après la loi italienne c'est un article qui est annexé à une loi qui elle est aussi annexée au code civil. Je comprends très bien que dans quasiment tous les codes civils il y a des dispositions de caractère pénal. Je le considérerais plutôt de caractère pénal que criminel.
- Q. Quelle distinction faites-vous entre pénal et criminel?
  R. Et bien entre pénal et criminel d'abord il y a réellement intentionnel. Un acte criminel peut se différencier d'un acte simplement pénal par l'absence ou la présence de l'intention.

#### CHAIRMAN:

- Q. Malum in se as opposed to malum prohibitum?
- A. Yes."

### and at page 18:

- "Q. Quelle est la peine naximum que l'on peut encourir pour une violation de cet article?
- R. Dans le temps où le décret est devenu loi c'était 400 lires et 40,000 lires. Maintenant en vertu d'une loi que je ne pourrais pas vous donner la référence, une loi intervenue après 1953 la peine a été portée à 100,000 lires.
- Q. Mais il s'agit toujours d'amende?
- R. Oui, toujours.

#### ME BLANK:

- Q. Combien cela vaut en argent canadien?
- R. Cent cinquante dollars.
- Q. C'est le maximum?
- R. Oui.

- Q. And the judge would not be entitled to proceed by decree if the person would be subject to imprisonment?A. Correct, exactly.
- Q. Now, in such --- in rendering such judgments, is there a trial, is there a proceeding before the judge, "un débat" as we call it?
- A. There is a summons which is sent to the defendant and after that, on the date fixed, the judge renders judgment on the basis of the written evidence before him. If it is a NSF cheque, that is sufficient and it will be rendered on that.
- Q. Now, am I to understand that if I issue a cheque with funds in the bank and for some reason let's say the cheque is passed only a week after, at which time by error or omission there is not sufficient fund, would the fact that it was given in good faith still renders a person liable under this decree?
- A. Yes, it would. Every time a bank has to return an NSF cheque it has to inform the judicial authorities.
- Q. Now, with respect to the other judgment, the last judgment, could you tell us more about it? What type of judgment was it? I know it's the same Decree?
- A. It's under the Italian Social Laws. There is an institute in Italy which collects deductions made at source, contributions made by the employer towards certain funds to which the employee is entitled to and the keeping of books and so on. It is an offence of this type.
- Q. Would it be similar to our collective agreement ---Collective Agreement Act in the Province of Quebec?
- A. Yes, it would be under Social Law, yes.
- Q. Now, under this law, the Social law, is the mere fact of making an omission, for example even if you forget to make an entry or you forget to pay or make payment on time such as you have it on income tax deductions at source, say the lst of the month, you are liable to fine. Is this similar?
- A. If it is not similar it is almost the same.

#### CHAIRMAN:

- Q. Did you say that the word "reato" may be translated as "crime"?
- A. Yes, it may be translated as "crime" as "misdemeanour" or an offence in general.

#### M. NADON:

- Q. Vous avez dit tout à l'heure que lorsque l'on procédait par décret on procédait toujours par sommation. Quel est le but de cette sommation?
- R. C'est de prévenir le prévenu.
- Q. Même si le prévenu ne se présente pas?
- R. Oui, il est procédé quand même.
- Q. Et à ce moment-là disons la poursuite est prise au nom de qui?
- R. Elle est prise au nom de l'état.
- Q. Et si le prévenu se présente?
- R. Il peut donner ses raisons, le juge entendra les raisons et rendra jugement en même temps.
- Q. Est-ce qu'il y a quand même d'obtenir un acquittement de ces accusations-là?
- R. Et bien j'ai dit tantôt l'acquittement est toujours possible. Vous avez des défauts de formes, vous avez toutes sortes de raisons pour lesquelles un jugement de culpabilité ne pourrait pas être rendu dans un cas pareil vu que ces lois-là reçoivent généralement une application très restrictive à cause du nombre, comprenez bien, du nombre énorme de chèques NSF qui circulent de nos jours.
- Q. Et quelqu'un qui passe énormément de chèques sans fonds? est-ce qu'il est toujours poursuivi?
- A. Oui. Il y a d'autres questions qui ne sont pas mentionnées dans cet appendice, comme on lui interdit d'avoir un compte de banque et à ce moment-là il ne pourra même pas ouvrir un compte de banque et d'autres sanctions de ce genre-là.
- Q. Je veux seulement que re-vérifier. La poursuite par décret, tout à l'heure vous avez dit qu'elle était prévue au code criminel?
- R. Oui, c'est un type de procédure.
- Q. Prévue au code criminel?
- R. Oui.
- Q. Et est-ce que quelqu'un qui passe un faux chèque a un dossier judiciaire lorsqu'il est trouvé coupable?
- R. Ah oui, certainement.
- Q. Si jamais il repasse devant le tribunal on produit son dossier, les infractions apparaîtront à la face même du dossier?
- R. Oui, on le saurait.

- Q. And it includes all three, crimes, misdemeanour and offence?
- Q. What does the Italian word "IMPUTATO" mean?

A. Accused. Prévenu en français."

# Contre-interrogé par Me Nadon, il répondit ceci:

- "Q. Les deux articles, l'article 116 entre autre, du décret royal, est-ce que l'on peut les considérer comme étant de nature criminelle?
- R. Comme je viens d'expliquer mon point de vue, d'après la loi italienne c'est un article qui est annexé à une loi qui elle est aussi annexée au code civil. Je comprends très bien que dans quasiment tous les codes civils il y a des dispositions de caractère pénal. Je le considérerais plutôt de caractère pénal que criminel.
- Q. Quelle distinction faites-vous entre pénal et criminel?
  R. Et bien entre pénal et criminel d'abord il y a réellement intentionnel. Un acte criminel peut se différencier d'un acte simplement pénal par l'absence ou la présence de l'intention.

### CHAIRMAN:

Q. Malum in se as opposed to malum prohibitum?

# et à la page 18:

- 'Q. Quelle est la peine maximum que l'on peut encourir pour une violation de cet article?
- R. Dans le temps où le décret est devenu loi c'était 400 lires et 40,000 lires. Maintenant en vertu d'une loi que je ne pourrais pas vous donner la référence, une loi intervenue après 1953 la peine a été portée à 100,000 lires.
- Q. Mais il s'agit toujours d'amende?
- R. Oui, toujours.

#### ME BLANK:

- Q. Combien cela vaut en argent canadien?
- R. Cent cinquante dollars.
- Q. C'est le maximum?
- R. Oui.
- Q. Et le minimum?
- R. Le minimum 400 lires donc soixante-quinze sous.

#### M. PATERAS:

Q. From the questions my confrère asked could I ask an additional question?

#### CHAIRMAN:

A re-examination?

#### M. PATERAS:

Yes.

- Q. My learned friend just asked you about the fact that the proceeding came from the Criminal Code of procedure. Now, would you be in a position to compare that to our summary conviction which are for penal and civil procedure in Quebec?
- A. No, I will not. It's less than that because the judge is entitled to render a judgment on the basis of the document of the written evidence submitted."

At the request of the Board, Me Tucci provided a translation of Article 116 of the Royal Decree, which reads as follows:

- "Art. 116 Is punishable with a fine from Lire 40,000 and, in the gravest cases also with imprisonment up to six months, unless the act would constitute an offense punishable with a greater penalty:
- whoever issues a bank cheque, without the authorization of drawer;
- 2) whoever issues a bank cheque without a sufficient sum existing with the drawee, or, after issuing it and prior to its due date for presentation, disposes of the sum, in whole or in part, in a different manner;
- 3) whoever issues a bank cheque without a date or with a false date or without any of the requisites indicated in paragraphs 1, 2, 3 and 5 of art. 1 and in art. II;
- 4) whoever issues a bank cheque in violation of the provisions of art. 6, last paragraph;

If the guilty party, in the cases provided for under numbers 2 and 3, furnishes the drawee with the sum before presentation of the cheque, the penalty is reduced by one half and, whenever the issuance is made under an excusable act, it is exempted from the penalty."

#### M. NADON:

- Q. Vous avez dit tout à l'heure que lorsque l'on procédait par décret on procédait toujours par sommation. Quel est le but de cette sommation?
- R. C'est de prévenir le prévenu.
- Q. Même si le prévenu ne se présente pas?
- R. Oui, il est procédé quand même.
- Q. Et à ce moment-là disons la poursuite est prise au nom de qui?
- R. Elle est prise au nom de l'état.
- Q. Et si le prévenu se présente?
- R. Il peut donner ses raisons, le juge entendra les raisons et rendra jugement en même temps.
- Q. Est-ce qu'il y a quand même d'obtenir un acquittement de ces accusations-là?
- R. Et bien j'ai dit tantôt l'acquittement est toujours possible. Vous avez des défauts de formes, vous avez toutes sortes de raisons pour lesquelles un jugement de culpabilité ne pourrait pas être rendu dans un cas pareil vu que ces lois-là reçoivent généralement une application très restrictive à cause du nombre, comprenez bien, du nombre énorme de chèques NSF qui circulent de nos jours.
- Q. Et quelqu'un qui passe énormément de chèques sans fond, est-ce qu'il est toujours poursuivi?
- R. Oui. Il y a d'autres questions qui ne sont pas mentionnées dans cet appendice, comme on lui interdit d'avoir un compte de banque et à ce moment-là il ne pourra même pas ouvrir un compte de banque et d'autres sanctions de de genre-là.
- Q. Je veux seulement que re-vérifier. La poursuite par décret, tout à l'heure vous avez dit qu'elle était prévue au code criminel?
- A. Oui, c'est un type de procédure.
- O. Prévue au code criminel?
- A. Oui.
- Q. Et est-ce que quelqu'un qui passe un faux chèque a un dossier judiciaire lorsqu'il est trouvé coupable?
- R. Ah oui, certainement.

The English translation of articles 506 and 507 of the Italian Code of Civil Procedure, under which Mr. Caruana was sentenced, reads as follows:

### "(ITALIAN) CODE OF CRIMINAL PROCEDURE

Articles 506 and 507

(Page 240 of original code)

Section III - Judgment by Decree (or Summary Conviction)

506. Cases for judgment by decree and powers of the Pretore\*

The Pretore who, in proceedings for crimes prosecutable ex officio, following the examination of the documents in the case and the investigations which he considers necessary, deems that only the payment of a fine or amends\*\* be ordered may pronounce the sentence by decree (or Summary Conviction) (507) without proceeding to trial. With the decree of sentence, the Pretore applies the penalty, orders the convicted person to pay procedural costs and orders confiscation if necessary or the restitution of the sequestered items. In the cases provided for by articles 196 and 197 of the Penal Code he further declares the responsibility of the person civilly obligated to pay the amends. He may also lay down when the law so consents the conditional suspension of the penalty (P. 163 s.) and the non-mention of the conviction in the Penal Certificate issued at private request (P. 175).

Procedure by decree is not admitted when the accused has been declared to be criminal or an habitual or a professional offender or delinquent by inclination (P. 102s.) and in every case in which it is possible to apply to the accused a measure of preventive security (P. 215).

If the decree has been pronounced outside those cases allowed by the law, the Crown (Attorney) initiates, before extinctive action in respect of the crime supervenes (P. 150 s.),

<sup>\*</sup> Local Stipendiary Magistrate

<sup>\*\* &</sup>quot;Amenda - Fine levied for lesser crimes such as misdemeanors whilst the "multa" is a fine imposed for a crime.

<sup>(1)</sup> So modified with decree promulgated on 5th October 1945, No. 679 (Appendix No. 7)

- Q. Si jamais il repasse devant le tribunal on produit son dossier, les infractions apparaîtront à la face même du dossier?
- A. Oui, on le saurait.

#### M. PATERAS:

Q. From the questions my confrère asked could I ask an additional question?

#### CHAIRMAN:

A re-examination?

#### M. PATERAS:

Yes.

- Q. My learned friend just asked you about the fact that the proceeding came from the Criminal Code of procedure. Now, would you be in a position to compare that to our summary conviction which are for penal and civil procedure in Quebec?
- A. No, I will not. It's less than that because the judge is entitled to render a judgment on the basis of the document of the written evidence submitted."

A la demande de la Commission, Me Tucci a fourni une traduction de l'article 116 du Décret royal, qui est formulé comme suit:

- "Art. 116 Is punishable with a fine from Lire 40,000 and, in the gravest cases also with imprisonment up to six months, unless the act would constitute an offense punishable with a greater penalty:
  - whoever issues a bank cheque, without the authorization of drawer;
- 2) whoever issues a bank cheque without a sufficient sum existing with the drawee, or, after issuing it and prior to its due date for presentation, disposes of the sum, in whole or in part, in a different manner;
- 3) whoever issues a bank cheque without a date or with a false date or without any of the requisites indicated in paragraphs 1, 2, 3 and 5 of art. 1 and in art. II;
- 4) whoever issues a bank cheque in violation of the provisions of art. 6, last paragraph;

penal action in the usual manner. The judge by his sentence also pronounces the revocation of the decree and of the acts of execution of the same, ordering in case of the dismissal of the charge, the restitution of the monies paid and in the case of conviction the subtraction of the penalty already served from that inflicted by the same sentence.

### 507. Formal requirements of the penal decree. Opposition. -

The decree of sentence contains:

- Personal particulars of the accused and where necessary of the person civilly obligated to pay the amends.
- Description of the deed committed, of the nature of the crime and of the circumstances.
- The summary indication of the motives, in fact and in law, on which the decision was based.
- The decision, with an indication of the articles of law applied.
- The date and the signature of the Pretore and Clerk of the Court.

Copy of the decree together with the order mentioned in article 586 is notified to the accused, or, when it is the case, to the person civilly obligated to pay the amends, with the advice that they are entitled to oppose the judgment within a period of five days from the notification.

If this time limit elapses without opposition being proposed, the decree becomes operative immediately."

Mr. Pateras argued that the "condemnations" in question were not criminal convictions, in that the "offence" in question was not a crime. He cited the Board's decision in Turpin v. Minister of Manpower and Immigration, (supra) wherein reference was made to Re Brooks, (1945) 1 D.L.R. 726. This reference was made in respect of "crimes involving moral turpitude"; there was no question that Turpin had been convicted of a crime, since he was convicted in Canada under the Criminal Code. However, in Re Brooks, Rose, C.J.H.C. said, at page 731: "Foreign law is a fact to be proved, and there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non-vult, I do not think that (the Special Inquiry Officer) had before him any evidence that Brooks had ... been convicted of anything ..."

In Moore v. Minister of Manpower and Immigration (1969) 1 I.A.C. 154), A.B. Weselak, Member, in handing down the reasons of the Board, quoted the above extract from Re Brooks, and continued (page 10):

If the guilty party, in the cases provided for under numbers 2 and 3, furnishes the drawee with the sum before presentation of the cheque, the penalty is reduced by one half and, whenever the issuance is made under an excusable act, it is exempted from the penalty."

La traduction anglaise des articles 506 et 507 du Code italien de procédure civile aux termes desquels M. Caruana a été condamné est la suivante:

# "(ITALIAN) CODE OF CRIMINAL PROCEDURE

Articles 506 and 507

(Page 240 of original code)

Section III - Judgment by decree (or Summary Conviction)

506. Cases for judgment by decree and powers of the Pretore\*

The Pretore who, in proceedings for crimes prosecutable ex officio, following the examination of the documents in the case and the investigations which he considers necessary, deems that only the payment of a fine or amends\*\* be ordered may pronounce the sentence by decree (or Summary Conviction) (507) without proceeding to trial. (1) With the decree of sentence, the Pretore applies the penalty, orders the convicted person to pay procedural costs and orders confiscation if necessary or the restitution of the sequestered items. In the cases provided for by articles 196 and 197 of the Penal Code he further declares the responsibility of the person civilly obligated to pay the amends. He may also lay down when the law so consents the conditional suspension of the penalty (P. 163 s.) and the non-mention of the conviction in the Penal Certificate issued at private request (P. 175).

Procedure by decree is not admitted when the accused has been declared to be criminal or an habitual or a professional offender or delinquent by inclination (P. 102 s.) and in every case in which it is possible to apply to the accused a measure of preventive security (P. 215).

<sup>\*</sup> Magistrat Stipendiaire Local.

<sup>\*\*</sup> Amende perçue pour crimes de moindre importance tels des infractions, alors que la "multa" est une amende imposée pour un crime.

<sup>(1)</sup> Ainsi modifié par suite d'un décret  $n^{\rm O}$  679 du 5 octobre 1945 (annexe  $n^{\rm O}$  7)

"The Board is in full agreement with the reasons given by Rose, C.J. in the Brooks case and would probably allow this appeal following his reasoning. The Board is, however, of the opinion, with due respect, that the presumption in law that in the absence of evidence of foreign law, the foreign law is presumed to be as Canadian Law had not been considered and should be considered by the Board. This principle is enunciated in "An Introduction to Evidence by G.D. Noakes, 4th Ed. at p. 41 as follows:

"In English Courts when evidence of the Law of any other country is heard the effect of the evidence is to be decided by the Judge alone in both Civil and Criminal Proceedings. The general law of a foreign state is presumed to be the same as English Law in the absence of evidence to the contrary and this presumption usually involves evidence in rebuttal."

Moore's criminal record showed that he had been convicted of theft in the United States. The learned member (at page 15 of the full judgment) stated: "... The Board finds that in the absence of any evidence to the contrary it should assume the crimes of theft to be identical in the two countries... the onus of proof that the crime of theft in the U.S.A. was not such a crime in its element as to constitute the crime of theft in Canada is on the appellant who alleges it and in this case no evidence was adduced."

It may be noted that in the instant appeal the Board had evidence before it of the foreign law relating to the "condemnations" This is, however, an appeal from the decision of a Special Inquiry Officer, and essential to this decision was a finding that Mr. Caruana had in fact been convicted of a criminal offence. Did Special Inquiry Officer Robert have sufficient evidence before him to make such a finding?

During the inquiry on August 25, 1967, the Special Inquiry Officer asked Mr. Caruana (page 23, Minutes of Inquiry):

"Q. Mr. Caruana, on the 22nd of October 1956, before the District Court of Cattolica Eraclea, were you condemned to pay a fine of 20,000 lires?

The reply to this question was "Yes".

"Q. Were you condemned to this fine concerning a cheque?
A. Yes it is concerning a cheque without funds."

It may be noted in passing that the date mentioned by the Special Inquiry Officer is wrong as may be seen in examining a copy of the original judgment, dated 20 October 1962.

Questioned by Me Pateras (page 32):

If the decree has been pronounced outside those cases allowed by the law, the Crown (Attorney) initiates, before extinctive action in respect of the crime supervenes (P.150 s.), penal action in the usual manner. The judge by his sentence also pronounces the revocation of the decree and of the acts of execution of the same, ordering in case of the dismissal of the charge, the restitution of the monies paid and in the case of conviction the subtraction of the penalty already served from that inflicted by the same sentence.

507. Formal requirements of the penal decree. Opposition. -

## The decree of sentence contains:

- 1. Personal particulars of the accused and where necessary of the person civilly obligated to pay the amends.
- Description of the deed committed, of the nature of the crime and of the circumstances.
- 3. The summary indication of the motives, in fact and in law, on which the decision was based.
- 4. The decision, with an indication of the articles of law applied.
- The date and the signature of the Pretore and Clerk of the Court.

Copy of the decree together with the order mentioned in article 586 is notified to the accused, or, when it is the case, to the person civilly obligated to pay the amends, with the advice that they are entitled to oppose the judgment within a period of five days from the notification.

If this time limit elapses without opposition being proposed, the decree becomes operative immediately."

M. Pateras a soutenu que les condamnations ("condemnations") en question n'entraînaient pas une culpabilité criminelle et que l'infraction n'était pas un crime. Il a invoqué la décision de la Commission dans l'affaire Turpin v. Minister of Manpower and Immigration (supra), décision qui se reportait à Re Brooks, (1945) 1 D.L.R. 726. Cette référence portait sur les "crimes impliquant turpitude morale"; Turpin avait incontestablement été trouvé coupable d'un crime puisqu'il avait été condamné au Canada, en vertu du Code pénal. Cependant, dans l'affaire Re Brooks, Rose, C.J.H.C., affirmait à la page 731: "foreign law is a fact to be proved, and there being no evidence either as to the meaning or as to the effect in New-Jersey of a plea of non-vult, I do not think that (the Special Inquiry Officer) had before him any evidence that Brooks had ... been convicted of anything..."

- "Q. You were questioned on two cheques most specifically post-dated cheques which were returned without sufficient funds, now, do I understand that these cheques were paid by you subsequently?
- A. Yes. I paid the fine after I paid them back.
- Q. One fine is 20,000 Lires which is how much money in Canadian money?
- A. \$45.00.
- Q. Another 50,000 Lires which is about what?
- A. \$115.00.
- Q. The offences that were mentioned to you, are they criminal offences under the criminal code of Italy?

### BY SPECIAL INQUIRY OFFICER (To Me Bruno Pateras)

I do not think the witness is qualified, I will allow the question if you rephrase it "to your knowledge".

### BY Me BRUNO PATERAS (to person concerned)

- Q. To your knowledge, are these offences criminal offences under the criminal code or statutory offences?
- A. It is not criminal, it is a civil code."

After a few further questions, not relevant to this point, Immigration Officer Pépin requested an adjournment. Me Blank then said (page 33):

"...In view of the remarks of the Inquiry Officer, we, of the defence, are going to try and get the original documents of his alleged offenses in Italy in order to show that these are civil offenses. I may add that it is almost unnecessary in an inquiry of this sort as the burden of proof is upon the Department unlike an inquiry at the border where the burden of proof is upon the subject requesting admission. In order to facilitate and to show our good faith, we are prepared to obtain these documents in Italy and perhaps an opinion of the Italian law to know exactly where we stand ...".

The inquiry was resumed on 13 August 1968. Me Pateras then stated that Me Tucci was willing to testify as to the Italian law relating to the judgments in question, if a date could be arranged at his convenience. Mr. Pépin then filed certain documents which were introduced into the record as Exhibit I. The documents relevant to the present discussion are copies of two judgments rendered in Italian Courts, and the official translations thereof, which read as follows:

Dans l'affaire Moore c. Minister of Manpower and Immigration ((1969), I.A.C. 154), le membre de la Commission A.B. Weselak citait dans les raisons de la décision, cet extrait de Re Brooks et ajoutait ce qui suit (page 10):

'The Board is in full agreement with the reasons given by Rose, C.J. in the Brooks case and would probably allow this appeal following his reasoning. The Board is however, of the opinion, with due respect, that the presumption in law that in the absence of evidence of foreign law, the foreign law is presumed to be as Canadian law had not been considered and should be considered by the Board. This principle is enunciated in "An Introduction to Evidence by G.D. Noakes, 4th Ed. at p. 41 as follows:

"In English Courts when evidence of the Law of any other country is heard the effect of the evidence is to be decided by the Judge alone in both Civil and Criminal Proceedings. The general law of a foreign state is presumed to be the same as English Law in the absence of evidence to the contrary and this presumption usually involves evidence in rebuttal."

, Le dossier judiciaire de Moore contenait une condamnation pour vol aux Etats-Unis. M. Weselak affirmait ceci (à la page 15 de la décision): "...The Board finds that in the absence of any evidence to the contrary it should assume the crime of theft to be identical in the two countries .... the onus of proof that the crime of theft in the U.S.A. is not such a crime in its element as to constitute the crime of theft in Canada is on the appellant who alleges it and in this case no evidence was adduced."

Rappelons, qu'en instance, la Commission a accès à des preuves concernant la loi italienne en ce qui a trait à ces condamnations ("condemnations"). Il s'agit ici cependant de l'appel d'une décision de l'enquêteur spécial, décision essentiellement fondée sur le fait que M. Caruana a été trouvé coupable d'un délit criminel. L'enquêteur spécial Robert avait-il suffisamment de preuve pour affirmer un tel fait?

Au cours de l'enquête, le 25 août 1967, l'enquêteur spécial a posé les questions suivantes à M. Caruana (page 24 du procès-verbal de l'enquête):

"Q. Mr. Caruana, on the 22nd of October 1956, before the District Court of Cattolica Eraclea, were you condemned to pay a fine of 20,000 lires?

La réponse à cette question fut "Yes".

"Penal Decree (Art. 506 and 507 of the Code of Penal Procedure)

Penal Decree No. 96

Republic of Italy

In the Name of the Italian People

The Vice-Pretore of Cattolica Eraclea

Having examined the legal proceedings against Caruana Leonardo, born on 15 February 1921 at Siculiana, and where resident,

### Charged with

the offense under Art. 116 of the Royal Decree of 21.12.1933 No. 1736, for having issued on the Bank of Sicilia, Agrigento Branch No. 2, a check for L. 300,000 in favour of Messrs. Martini and Rossi Company which was not covered by funds and was dishonoured. In Siculiana, on the 15 July 1962.

The Court held that the responsibility of the aforesaid with regard to the charge against him was proved and that it was just to inflict the monetary punishment due.

Under Art. 506 and 507 of the Code of Penal Procedure the Court condemned the accused, Caruana Leonardo, to a fine of L. 20,000 and to expenses of courts costs. The Court ordered that the aforesaid accused be notified by a copy of the present decree the warning that if within 5 days from this notice he does not take steps to impugn the sentence presenting himself before the Clerk of the Court or through a lawyer, to ask for a hearing, the decree will become final.

Cattolica Eraclea, dated 20 October 1962

(signed) The Vice-Pretore A. Marsala

(signed) The Clerk of the Court G. Marino.

This copy conforms to the original and is given at the request of the interested party, in order to obtain Canadian citizenship.

Cattolica Eraclea, 6 September 1967

- Q. Were you condemned to this fine concerning a cheque?
- A. Yes it is concerning a cheque without funds."

Notons en passant que la date mentionnée par l'enquêteur spécial est fausse d'après une copie du jugement original en date du 20 octobre 1962.

# Interrogé par Me Pateras, M. Caruana répondit ainsi:

- ''Q. You were questioned on two cheques most specifically post-dated cheques which were returned without sufficient funds, now, do I understand that these cheques were paid by you subsequently?
- A. Yes. I paid the fine after I paid them back.
- Q. One fine is 20,000 lires which is how much money in Canadian money?
- A. \$45.00.
- Q. Another 50,000 Lires which is about what?
- A. \$115.00.
- Q. The offences that were mentioned to you, are they criminal offences under the criminal code of Italy?

# BY SPECIAL INQUIRY OFFICER (to Me Bruno Pateras)

I do not think the witness is qualified, I will allow the question if you rephrase it "to your knowledge".

# BY Me BRUNO PATERAS (to person concerned)

- Q. To your knowledge, are these offences criminal offences under the criminal code or statutory offences?
- A. It is not criminal, it is a civil code."

Après quelques questions portant sur d'autres points, le fonctionnaire à l'immigration Pépin demanda l'ajournement. Me Blank dit alors ceci (page 33):

"...In view of the remarks of the Inquiry Officer, we, of the defence, are going to try and get the original documents of his alleged offenses in Italy in order to show that these are civil offenses. I may add that it is almost unnecessary in an inquiry of this sort as the burden of proof is upon the Department unlike an inquiry at the border where the burden of proof is upon the subject requesting admission. In order to facilitate and to show our good faith, we are prepared to obtain these documents in Italy and perhaps an opinion of the Italian law to know exactly where we stand...".

Clerk of the Court"

'Decree of Penal Sentence

Republic of Italy

In the Name of the Italian People

The Pretore of Agrigento

Having examined the judicial proceedings against Caruana Leonardo, son of Gerlando, born at Siculiana on 15 February 1921 and where resident at Via Guglielmo Marconi

#### CHARGED WITH

issuing a cheque of L. 600,000 without having sufficient funds to cover the cheque.

In Agrigento, on 10 September 1961

the Court retained that the accusation against the aforesaid was proved and it was just to inflict the monetary sentence due as per Art. 506 and 507 of the Code of Penal Procedure, the Court condemned the aforesaid to a fine of L. 50,000 and the confiscation of the cheque.

The Court ordered that the aforesaid be notified by a copy of the present decree warning him that if within five days of this notification he did not take steps in person or through an advocate to impugn against the sentence in the office of the Clerk of the Court and request for a hearing, the sentence will become final.

(signed) The Pretore, 28 May 1962

(signed) The Clerk of the Court

True copy given at the request of advocate Giovanni Borsellino in the interest of Caruana Leonardo.

Agrigento, 6.9.1967

(signed) The Clerk of the Court."

During the course of the inquiry on 13 August 1968, Mr. Blank asked the Special Inquiry Officer (page 46):

"Q. Do you want this Italian expert or not?

A. To be very frank with you I certainly appreciate the opportunity of a person having experience in Italian

La reprise de l'enquête eut lieu le 20 août 1968. Me Pateras déclara alors que Me Tucci était prêt à donner son témoignage sur les lois italiennes ayant trait aux jugements en question, si l'on pouvait fixer une date qui lui conviendrait. M. Pépin déposa ensuite certains documents qui furent portés au dossier comme pièce à l'appui "I". Les documents ayant rapport au point qui nous intéresse présentement sont des copies et des traductions officielles des deux jugements rendus par les tribunaux italiens. Les jugements sont ainsi formulés:

"Penal Decree (Art. 506 and 507 of the Code of Penal Procedure)

Penal Decree No. 96

Republic of Italy

In the Name of the Italian People

The Vice-Pretore of Cattolica Eraclea

Having examined the legal proceedings against Caruana Leonardo, born on 15 February 1921 at Siculiana, and where resident,

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the offense under Art. 116 of the Royal Decree of 21.12.1933 No. 1736, for having issued on the Bank of Sicilia, Agrigento Branch No. 2, a check for L. 300,000 in favour of Messrs. Martini and Rossy Company which was not covered by funds and was dishonoured. In Siculiana, on the 15 July 1962.

The Court held that the responsibility of the aforesaid with regard to the charge aginst him was proved and that it was just to inflict the monetary punishment due.

Under Art. 506 and 507 of the Code of Penal Procedure the Court condemned the accused, Caruana Leonardo, to a fine of L. 20,000 and to expenses of court costs. The Court ordered that the aforesaid accused be notified by a copy of the present decree the warning that if within 5 days from this notice he does not take steps to impugn the sentence presenting himself before the Clerk of the Court or through a lawyer, to ask for a hearing, the decree will become final.

Cattolica Eraclea, dated 20 October 1962

(signed) The Vice-Pretore A. Marsala

(signed) The Clerk of the Court G. Marino.

This copy conforms to the original and is given at the request of the interested party, in order to obtain Canadian citizenship.

Law although I will not decide under the Italian Law. In other words the facts which are in the present are subject under the Canadian Criminal Code to justify the committal of a crime involving moral turpitude."

The inquiry was further adjourned and was resumed on 29 August 1968, on which date the Special Inquiry Officer rendered his decision. There is nothing on the record to show that Messrs Blank and Pateras made any effort to call Me Tucci, despite the fact that the Special Inquiry Officer was perfectly willing to hear his evidence. The relevant portion of Mr. Robert's reasons for the decision, i.e. the order of deportation, read as follows: (page 50)

"As to the convictions concerning the cheques they appear to me to be criminal offences in that they are rendered under the Code of Penal Procedure and that they conclude that a penalty be imposed. They are not rendered under a Criminal Law or the Italian Civil Code. Though again even if they are criminal offences I am not satisfied they are offences involving moral turpitude in the circumstances before me. The only question left is the interpretation to be given to paragraph (viii) of Section 19(1)(e). Did Mr. Caruana come into Canada by reason of any false or misleading information. I am of the opinion that Mr. Caruana on the 12th of October 1966 when asked Question 13 of the application form should have had answered by giving the full particulars concerning the criminal offences to wit the convictions concerning the two cheques. This information would have been valuable to the Department in order to take a decision on Mr. Caruana's application. On the contrary, Mr. Caruana decided not to give this information. Unfortunately because of the strictness and the generality of paragraph (viii) of section 19(1)(e) I will have to render a deportation order against Mr. Leonardo Caruana."

Despite his statement to Mr. Blank that he would not "decide under the Italian law" and that "the facts ... are subject (sufficient?) under the Canadian Criminal Code to justify the committal of a crime involving moral turpitude" Mr. Robert made no reference to the Code in his reasons for decision. However, an examination of the wording of the judgments themselves would appear to support the Special Inquiry Officer's decision, since the words used are a clear indication that the acts complained of were crimes by Italian law in the sense that the word crime is understood in Canada. There was, however, no proof of Italian law, as such, before the Special Inquiry Officer - and foreign law is a fact to be proved by the party seeking to rely on it. Since Mr. Caruana was a person seeking to come into Canada, he had the burden of proof pursuant to section 27(4) of the Immigration Act. It was up to him to prove that the acts complained of were not crimes by Italian law, and this burden he entirely failed to satisfy. Even if, following the

Cattolica Eraclea, 6 September 1967

Clerk of the Court"

'Decree of Penal Sentence

Republic of Italy

In the Name of the Italian People

The Pretore of Agrigento

Having examined the judicial proceedings against Caruana Leonardo, son of Gerlando, born at Siculiana on 15 February 1921 and where resident at Via Guglielmo Marconi

### CHARGED WITH

issuing a cheque of L. 600,000 without having sufficient funds to cover the cheque.

In Agrigento, on 10 September 1961

the Court retained that the accusation against the aforesaid was proved and it was just to inflict the monetary sentence due as per Art. 506 and 507 of the Code of Penal Procedure, the Court condemned the aforesaid to a fine of L. 50,000 and the confiscation of the cheque.

The Court ordered that the aforesaid be notified by a copy of the present decree warning him that if within five days of this notification he did not take steps in person or through an advocate to impugn against the sentence in the office of the Clerk of the Court and request for a hearing, the sentence will become final.

(signed) The Pretore, 28 May 1962

(signed) The Clerk of the Court

True copy given at the request of advocate Giovanni Borsellino in the interest of Caruana Leonardo.

Agrigento, 6.9.1967

(signed) The Clerk of the Court."

Au cours de l'enquête, le 13 août 1968, M. Blank posa la question suivante à l'enquêteur spécial (page 46):

reasoning of Rose C.J.H.C. in Re Brooks, it be held that the Special Inquiry Officer had no proof before him to support any claim that the acts complained of were crimes by Italian law, the presumption that foreign law is the same as that of Canada, unless the contrary be proved, supports the decision, since on the face of the judgments the acts complained of would fall within section 304 of the Criminal Code which reads:

"304.(1) Every one commits an offence who

- (a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;
- (b) obtains credit by a false pretence or by fraud;
- (c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied upon, with respect to the financial condition or means or ability to pay of himself or any person, firm or corporation that he is interested in or that he acts for, for the purpose or procuring, in any form whatsoever, whether for his benefit or the benefit of that person, firm or corporation,
  - (i) the delivery of personal property,
  - (ii) the payment of money,
  - (iii) the making of a loan,
    - (iv) the extension of credit,
    - (v) the discount of an account receivable, or
    - (vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft, or promissory not; or
- (d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or another person, firm or corporation that he is interested in or that he acts for, procures upon the faith of that statement, whether for his benefit or for the benefit of that person, firm or corporation, anything mentioned in subparagraphs (i) to (vi) of paragraph (c).

"Q. Do you want this Italian expert or not?
A. To be very frank with you I certainly appreciate the opportunity of a person having experience in Italian Law although I will not decide under the Italian Law. In other words the facts which are in the present are subject under the Canadian Criminal Code to justify the committal of a crime involving moral turpitude."

L'enquête fut encore une fois ajournée et reprise le 29 août 1968, date à laquelle l'enquêteur spécial rendit sa décision. Rien n'indique que Messieurs Blank et Pateras aient tenté d'appeler Me Tucci, malgré le fait que l'enquêteur spécial ait accepté d'entendre son témoignage. La partie pertinente des raisons de la décision de M. Robert, soit l'ordonnance d'expulsion, est rédigée en ces termes:

"As to the convictions concerning the cheques they appear to me to be criminal offences in that they are rendered under the Code of Penal Procedure and that the conclude a penalty be imposed. They are not rendered under a Criminal Law or the Italian Civil Code. Though again even if they are criminal offences I am not satisfied they are offences involving moral turpitude in the circumstances before me. The only question left is the interpretation to be given to paragraph (viii) of Section 19(e). Did Mr. Caruana come into Canada by reason of any false or misleading information. I am of the opinion that Mr. Caruana on the 12th of October 1966 when asked question 13 of the application form should have had answered by giving the full particulars concerning the criminal offences to wit the convictions concerning the two cheques. This information would have been valuable to the Department in order to take a decision on Mr. Caruana's application. On the contrary, Mr. Caruana decided not to give this information. Unfortunately because of the strictness and the generality of paragraph (viii) of section 19(1)(e) I will have to render a deportation order against Mr. Leonardo Caruana."

Malgré sa déclaration à M. Blank à l'effet qu'il n'avait pas l'intention de fonder sa décision sur la loi italienne ("decide under Italian Law") et que "the facts ... are subject (suffisants?) under the Canadian Criminal Code to justify the committal of a crime involving moral turpitude", M. Robert n'a pas fait appel au Code dans les raisons de sa décision. Cependant l'étude des termes des jugements eux-mêmes semblerait confirmer la décision de l'enquêteur spécial puisque les mots utilisés indiquent clairement que les actes qui ont donné lieu à l'instance constituaient des crimes aux termes de la loi italienne, au sens où l'on entend le mot crime au Canada. Il n'y eut cependant aucune preuve de présentée à l'enquêteur spécial quant aux lois italiennes comme

- (2) Every one who commits an offence under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable
  - (a) to imprisonment for ten years, where the property obtained is a testamentary instrument or where the value of what is obtained exceeds fifty dollars; or
  - (b) to imprisonment for two years, where the value of what is obtained does not exceed fifty dollars.
- (3) Every one who commits an offence under paragraph (b), (c) or (d) of subsection (1) is guilty of an indictable offence and is liable to imprisonment for ten years.
- (4) Where, in proceedings under paragraph (a) of subsection (1), it is shown that anything was obtained by the accused by means of a cheque that, when presented for payment within a reasonable time, was dishonoured on the ground that no funds or insufficient funds were on deposit to the credit of the accused in the bank or other institution on which the cheque was drawn, it shall be presumed to have been obtained by a false pretence, unless the court is satisfied by evidence that when the accused issued the cheque he had reasonable grounds to believe that it would be honoured if presented for payment within a reasonable time after it was issued."

It is true that Mr. Caruana's sworm testimony at the inquiry would indicate that the cheques were post-dated and that at the time he drew them he had reasonable grounds to believe that they would be honoured when presented, but the Special Inquiry Officer had neither the jurisdiction, nor the necessary evidence to enable him to retry Mr. Caruana for the offences alleged. He had before him undoubted proof of conviction by foreign courts, for an act which was a recognizable and identifiable crime by Canadian law, and he was therefore correct in concluding that Mr. Caruana had been convicted of a crime within the meaning of the Immigration Act.

The Special Inquiry Officer also came to the conclusion that the crime in question was not a crime involving moral turpitude, and he therefore did not include section 19(1)(e)(iv) of the Immigration Act as a ground of deportation. This decision was not argued or contested on appeal. It is, in effect, a finding that Mr. Caruana was not within a prohibited class of persons, specifically those defined in section 5(d) of the Immigration Act, at the time of his entry into Canada.

telles et les lois étrangères constituent un fait qui doit être prouvé par la partie qui y a recours. Puisque M. Caruana était une personne qui cherchait à entrer au Canada, il avait charge de la preuve en vertu de l'article 27(4) de la loi sur l'Immigration. Il lui incombait de prouver que les actes qui avaient donné lieu à l'instance ne constituaient pas des crimes de par les lois italiennes et il manqua complètement de s'aquitter de cette charge. Même si l'on maintient, pour les raisons invoquées par Rose, C.J.H.C., dans l'affaire Re Brooks, que l'enquêteur spécial n'avait entendu aucune preuve à l'appui de l'affirmation à l'effet que les actes qui avaient donné lieu à l'instance constituaient des crimes en vertu des lois italiennes, la présomption selon laquelle les lois étrangères sont les mêmes que les lois canadiennes, à moins de preuve du contraire, justifie la décision puisque, selon le libellé des jugements, les actes qui ont donné lieu à l'instance tombent sous l'article 304 du Code pénal, en vertu duquel:

"304.(1) Commet une infraction quiconque,

- (a) par un faux semblant, soit directement, soit par l'intermédiaire d'un contrat obtenu par un faux semblant, obtient une chose à l'égard de laquelle l'infraction de vol peut être commise ou la fait livrer à une autre personne;
- (b) obtient du crédit par un faux semblant ou par fraude;
- (c) sciemment fait ou fait faire, directement ou indirectement, une fausse déclaration par écrit avec l'intention qu'on y ajoute foi, en ce qui regarde sa situation financière ou ses moyens ou sa capacité de payer, ou la capacité financière, les moyens ou la capacité de payer de toute personne, maison de commerce ou corporation dans laquelle il est interessé ou pour laquelle il agit, en vue d'obtenir, sous quelque forme que ce soit, à son avantage ou pour le bénéfice de cette personne, maison ou corporation,
  - (i) la livraison de biens meubles ou personnels,
  - (ii) le paiement d'une somme d'argent,
  - (iii) l'octroi d'un prêt,
    - (iv) l'ouverture d'un crédit,
      - (v) l'escompte d'une valeur à recevoir ou
  - (vi) la création, l'acceptation, l'escompte ou l'endossement d'une lettre de change, d'un chèque, d'une traite ou d'un billet à ordre; ou

Mr. Robert's decision in respect of Mr. Caruana's liability to deportation pursuant to section  $19(1)\,(e)\,(viii)$  included a finding that Mr. Caruana failed to give full particulars concerning these criminal convictions, in other words, he gave false and misleading information within the meaning of section  $19(1)\,(e)\,(viii)$ .

At the inquiry, Mr. Caruana testified as follows in reply to a question by Me Pateras (page 32, Minutes of Inquiry):

- "Q. To your knowledge, are these offences criminal offences under the Criminal Code or statutory offences?
  - A. It is not criminal, it is a civil code."

At the hearing of his appeal, questioned by Me Pateras, Mr. Caruana testified (page 4, transcript of hearing):

- "Q. Now, I do not wish to go over the whole document, but this one question in particular which interests me. The first one, it says here "When have you ever been convicted ----"Have you ever been convicted of a crime or offence? answer "No." Do you remember, if you do, how this question was interpreted in Italian by your interpreter at that time?
- A. Yes.
- Q. How was it interpreted? What did he ask you in Italian? Say it in Italian?
- A. He asked me if I was ever in jail.
- Q. In relation to that same question, did the interpreter mention the word to you "offence"?
- A. No.
- Q. Did he ask you if you committed a crime?
- A. Yes."

## Cross-examined by Me Nadon (page 4A):

- "Q. Mais vous prétendez quand même que à la question 1:
  "Have you ever been convicted of a crime or offence?"
  qu'on ne vous a jamais posé la question telle quelle?
  - R. Non. On m'a simplement demandé si j'ai été arrêté ou incriminé."

## and at page 5:

- ''Q. Qu'est-ce que vous entendez par incriminé?
- R. Quand quelqu'un est arrêté il doit avoir un procès."

- (d) sachant qu'une fausse déclaration par écrit a été faite concernant sa situation financière, ou ses moyens ou sa capacité de payer, ou la capacité financière, les moyens ou la capacité de payer d'une autre personne, maison de commerce ou corporation dans laquelle il est interessé ou pour laquelle il agit, obtient sur la foi de cette déclaration, à son avantage ou pour le bénéfice de cette personne, maison ou corporation, une chose mentionnée aux sousalinéas i) à vi) de l'alinéa c).
- (2) Quiconque commet une infraction visée par l'alinéa a) du paragraphe (1) est coupable d'un acte criminel et passible
  - (a) d'un emprisonnement de dix ans, si le bien obtenu est un titre testamentaire, ou si la valeur de ce qui est obtenu dépasse cinquante dollars, ou
  - (b) d'un emprisonnement de deux ans, si la valeur de ce qui est obtenu ne dépasse pas cinquante dollars.
- (3) Est coupable d'un acte criminel et passible d'un emprisonnement de dix ans, quiconque commet une infraction visée par l'alinéa b), c) ou d) du paragraphe (1).
- (4) Lorsque, dans des procédures prévues par l'alinéa a) du paragraphe (1), il est démontré que le prévenu a obtenu une chose au moyen d'un chque qui, sur présentation au paiement dans un délai raisonnable, a subi un refus de paiement pour le motif qu'il n'y avait pas de provision ou de provision suffisante en dépôt au crédit du prévenu à la banque ou autre institution sur laquelle le chèque a été tiré, il doit être présumé que la chose a été obtenue par un faux semblant, sauf si la preuve établit, à la satisfaction de la cour, que lorsque le prévenu a émis le chèque il avait des motifs raisonnables de croire que le chèque serait honoré lors de la présentation au paiement dans un délai raisonnable après son émission."

Il est vrai que le témoignage assermenté de M. Caruana à l'enquête indique que les chèques étaient postdatés et qu'au moment où il les a émis il avait des raisons suffisantes de croire qu'ils seraient honorés lors de la présentation, mais l'enquêteur spécial n'avait ni les pouvoirs ni les preuves nécessaires pour juger de nouveau M. Caruana à l'égard

It was established that the interpreter at the time Mr. Caruana signed his second application, backdated to October 12, 1966, on August 24, 1967, and the statutory declaration of the same date, was one Giuseppe Cuffaro the brother-in-law of his brother, who also acted as his interpreter when he made his original application on October 12, 1967. Mr. Cuffaro testified at the hearing of the appeal, questioned by Me Pateras (page 22ff, transcripts of hearing):

- "Q. Now, I show you here Exhibit F which is an application, form 690, and on my photocopy it's page 2 of it and on the original it would be the back of it. At the bottom of the second page it reads "Acted as interpreter a friend, Giuseppe Cuffaro" and then there is a signature "Giuseppe Cuffaro, 3 November 1966". Is that your signature?
  - A. Yes.
  - Q. Did you act as interpreter for Mr. Caruana?
- A. Yes, I did.
- Q. Did you go to the Immigration with him?
- A. Yes.
- Q. Now, I wish to point your attention to item 13 which says: 'Have you or has any member of your family suffered from mental illness, tuberculosis, or been convicted of a criminal offence ...' These words 'convicted of a criminal offence' would you know how you interpreted these words to Mr. Caruana?
- A. What -- do I say it in Italian or ...
- Q. Would you say it in Italian?
- A. Well you see I told him this way because I speak with him Sicilian, a dialect not the Italian language. So I would have to say ... galera.

### INTERPRETER:

"Have you ever been in galères, in prison?"

#### MR. PATERAS:

- Q. Now, did you return to an immigration office with Mr. Caruana and Mr. Harry Blank later on?
- A. Not in the same year. We came back after I think about a year.
- Q. In 67?
- A. In 67.

des infractions dont il avait été accusé. Il avait devant lui la preuve indiscutable d'une condamnation par des tribunaux étrangers pour un acte qui est un crime reconnaissable et identifiable selon la loi canadienne, et il a eu raison de conclure que M. Caruana avait été trouvé coupable d'un crime, aux termes de la loi sur l'Immigration.

L'enquêteur spécial en arriva aussi à la conclusion que le crime en question n'était pas un crime impliquant turpitude morale; il ne mentionna donc pas l'article 19(1)(e)(vi) de la Loi sur l'immigration comme motif d'expulsion. Cette décision ne fut pas débattue ou contestée à l'appel. La décision porte en fait qu'au moment de son entrée au Canada, M. Caruana ne faisait pas partie d'une catégorie de personnes interdite, plus précisément de ces catégories définies à l'article 5(d) de la Loi sur l'immigration.

La décision de M. Robert à l'effet que M. Caruana était passible d'expulsion en vertu de l'article 19(1)(e)(viii) reposait sur la conviction que M. Caruana n'avait pas révélé tous les détails de ses condamnations pour crime, autrement dit, qu'il avait donné des renseignements faux et trompeurs aux termes de l'article 19(1)(e)(viii).

Au cours de l'enquête, M. Caruana à répondu comme suit à une question de Me Pateras (page 32 au procès-verbal de l'enquête):

- "Q. To your knowledge, are these offences criminal offences under the Criminal Code or statutory offences?
- A. It is not criminal, it is a civil code."

En réponse aux questions de Me Pateras à l'audition de l'appel, M. Caruana déclara ceci (procès-verbal de l'audition, page 4):

- "Q. Now, I do not wish to go over the whole document, but this one question in particular which interests me. The first one, it says here 'When have you ever been convicted -----'Have you ever been convicted of a crime or offence? Answer 'No." Do you remember, if you do, how this question was interpreted in Italian by your interpreter at the time?
- A. Yes.
- Q. How was it interpreted? What did he ask you in Italian?
- A. He asked me if I was ever in jail.
- Q. In relation to that same question, did the interpreter mention the word to you "offence"?
- A. No.
- Q. Did he ask you if you committed a crime?
- A. Yes.

- Q. And at that time do you remember if Mr. Caruana signed any document?
- A. Yes, he did.
- Q. Do you remember how many documents he signed?
- A. Two.
- Q. Two documents. I show you exhibit G which is similar to exhibit F. Now, can you remember whether Mr. Caruana signed this document on the second occasion?
- A. I don't remember where.
- Q. Do you remember if he signed this second document here, on August 24, 1967?
- A. Well I don't remember. I know he signed two, they made him sign two.
- Q. I see. Now, I show you exhibit H which bears the date of August 24, 1967 with the signature of Giuseppe Cuffaro. Is that your signature?
- A. Yes.
- Q. Did you act as the interpreter on August 24, 1967?
- A. Yes.
- O. Is that the date when two documents were signed?
- A. Yes.
- Q. Now, I draw your attention to question 1 "Have you ever been convicted of a crime or offence?". Would you remember how you interpreted that question to Mr. Caruana? Say it in Italian?
- A. The same way I did the first time (witness says something in Italian and interpreter translates "Have you ever been in prison")."

## Cross-examined by Mr. Nadon (page 24 ff):

- 'Q. And now you know how to translate offence in Italian?
- A. Yes.
- Q. And at that time you didn't know?
- A. Yes --- what do you mean "offence". There is no such word but I would translate what I would understand as "crime" or offence I dont't know, I think "offence" the way I learned English here, it's a crime, same thing, when you do something bad, they put you in jail.
- Q. What is the translation for crime or offence in Italian?
- A. I would say "galera".

# Contre-interrogé par Me Nadon, il répondit ceci (page 4A):

- "Q. Mais vous prétendez quand même que à la question 1:
  "Have you ever been convicted of a crime or offence?"
  qu'on ne vous a jamais posé la question telle quelle?
- R. Non. On m'a simplement demandé si j'ai été arrêté ou incriminé."

## et à la page 5:

- ''Q. Qu'est-ce que vous entendez par incriminé?
- R. Quand quelqu'un est arrêté il doit avoir un procès."

Il a été établi que lorsque, le 24 août 1967, M. Caruana a signé sa deuxième demande, antidatée au 12 octobre 1966, et la déclaration statutaire de même date, l'interprète était un nommé Giuseppe Cuffaro, beau-frère de son frère, qui avait déjà agi comme interprète au moment de la première demande, le 12 octobre 1967. M. Cuffaro a témoigné à l'audition de l'appel et il a répondu ainsi aux questions de Me Pateras (procès-verbal de l'audition, page 22 ss.):

- "Q. Now, I show you here Exhibit F which is an application, form 690, and on my photocopy it's page 2 of it and on the original it would be the back of it. At the bottom of the second page it reads "Acted as interpreter a friend, Giuseppe Cuffaro" and then there is a signature "Giuseppe Cuffaro, 3 November 1966". Is that you signature?
- A. Yes.
- Q. Did you act as interpreter for Mr. Caruana?
- A. Yes, I did.
- Q. Did you go to the Immigration with him?
- A. Yes.
- Q. Now, I wish to point your attention to item 13 which says: "Have you or has any member of your family suffered from mental illness, tuberculosis, or been convicted of a criminal offence..." These words "convicted of a criminal offence" would you know how you interpreted these words to Mr. Caruana?
- A. What -- do I say it in Italian or ...
- Q. Would you say it in Italian?
- A. Well you see I told him this way because I speak with him Sicilian, a dialect not the Italian language. So I would have to say ... galera.

### INTERPRETER:

"Have you ever been in galères, in prison?"

(Witness says something in Italian and interpreter translates: 'Did you ever make a mistake, have you ever been in jail')

- Q. So you are not sure of the exact translation you gave?
- A. Well I am not too well educated man, I have only 8 years and I learned the English here by myself and I can understand a little bit but not exactly word for word. I couldn't translate that.
- Q. But any way are you sure of the exact words that you used to translate this word?
- A. Yes, because if I did it now I would do the same thing.
- Q. And how do you translate question 7, it's on exhibit H?
- A. I would translate that as ...

(witness speaks Italian and interpreter translates:
'Have you ever been in jail or convicted").

Q. So, you would translate approximately the same?
A. Approximately the same thing. Because for me they all look alike ... stuff like this."

It was argued on behalf of Mr. Caruana that he did not give false and misleading information regarding his criminal convictions because he did not know they were criminal convictions - he thought it was a civil matter and because his interpreter innocently mislead him by using words which changed the import of the question asked, i.e. "Have you ever been in prison?" rather than "Have you ever been convicted of a crime or offence?" It may be noted that no mention of this supposed error in translation was made at the inquiry; the matter was raised for the first time on appeal.

It is difficult to assess the credibility of the appellant and his witness on this point. There is no doubt that, in accordance with the relevant Italian law, Mr. Caruana was convicted in absentia, and there may have been somme confusion in his mind as to whether these were criminal or "civil" offences. If he was in fact asked "Have you been in jail?" he gave an honest answer at least in so far as these offences were concerned. Though the credibility of his testimony and that of Mr. Cuffaro on this point may be somewhat doubtful, their testimony was uncontradicted and not materially shaken on cross-examination, and the doubt must be resolved in the appellant's favour.

The word "false" is defined in the Shorter Oxford Dictionary as:

### M. PATERAS:

- Q. Now, did you return to an immigration office with Mr. Caruana and Mr. Harry Blank later on?
- A. Not in the same year. We came back after I think about a year.
- Q. In 67?
- A. In 67.
- Q. And at that time do you remember if Mr. Caruana signed any documents?
- A. Yes, he did.
- Q. Do you remember how many documents he signed?
- A. Two.
- Q. Two documents. I show you exhibit G which is similar to exhibit F. Now, can you remember whether Mr. Caruana signed this document on the second occasion?
- A. I don't remember where.
- Q. Do you remember if he signed this second document here, on August 24, 1967?
- A. Well I don't remember. I know he signed two, they made him sign two.
- Q. I see. Now, I show you exhibit H which bears the date of August 24, 1967 with the signature of Giuseppe Cuffaro. Is that your signature?
- A. Yes.
- Q. Did you act as the interpreter on August 24, 1967?
- A. Yes.
- Q. Is that the date when two documents were signed?
- A. Yes.
- Q. Now, I draw your attention to question 1 'Have you ever been convicted of a crime or offence?''. Would you remember how you interpreted that question to Mr. Caruana? Say it in Italian?
- A. The same way I did the first time (witness says something in Italian and interpreter translates "Have you ever been in prison")."

Contre-interrogé par M. Nadon, il répondit ainsi (page 24ss.):

''Q. And now you know how to translate offence in Italian? A. Yes.

- "1. Erroneous .... Incorrect
  - Purposely untrue, mendacious, deceitful.

The root word is given as the latin verb  $\underline{\text{fallere}}$ , to deceive.

The word "mislead" defined in the same dictionary, means

"to lead into error"

The expression "false and misleading" used conjunctively as it was in the deportation order presently under appeal implies an element of mens rea, that is, that the information given must be knowingly erroneous. Since there was no satisfactory proof that Mr. Caruana gave incorrect information knowing that it was false and having the intention to mislead, there was no proof to support a vital part of the deportation order.

Mr. Caruana was ordered deported on the sole ground:

"You are a person described under paragraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada by reason of false and misleading information"

On the evidence there is no doubt that he is not a Canadian citizen nor is he a person having acquired Canadian domicile within the meaning of the Immigration  $\operatorname{Act}$ .

All the evidence adduced at the inquiry, as to the alleged false and misleading information, related to Mr. Caruana's application for permanent residence in Canada, on form IMM 690, actually signed October 12, 1966, and on the same form, signed August 24, 1967 and back-dated to 12 October 1966, in both of which Mr. Caruana stated "no" to the question "Have you ... been convicted of a criminal offence?"

The staturoty declaration made by Mr. Caruana on August 24, 1967, also bears the same answer to the same question, but this declaration was made long after Mr. Caruana entered Canada as a non-immigrant on September 19, 1966. No evidence whatsoever was adduced in respect of this entry, and in view of the wording of the deportation order this was the important incident as to which evidence of false and misleading information was relevant. In Turpin v. Minister of Manpower and Immigration, (supra) Scott, Chairman, in rendering the decision of the Board, stated (at page 5): "It is clear from a study of the (Immigration) Act as a whole, that where the words "come into" are used ... alone, for example in section 19(1)(e)(x) "came into Canada as a member of a crew" the words "come into" must be given

- Q. And at that time you didn't know?
- A. Yes --- what do you mean "offence". There is no such word but I would translate what I would understand as "crime" or offence I don't know, I think "offence" the way I learned English here, it's a crime, same thing, when you do something bad, they put you in jail.
- "Q. What is the translation for crime or offence in Italian?
  A. I would say "galera".

(Witness says something in Italian and interpreter translates: "Did you ever make a mistake, have you ever been in jail")

- Q. So you are not sure of the exact translation you gave? A. Well I am not too well educated man, I have only 8 years and I learned the English here by myself and I can understand a little bit but not exactly word for word. I couldn't translate that.
- Q. But any way are you sure of the exact words that you used to translate this word?
- A. Yes, because if I did it now I would do the same thing.
- Q. And how do you translate question 7, it's on exhibit H?
- A. I would translate that as ...

(Witness speaks Italian and interpreter translate: "Have you ever been in jail or convicted").

Q. So, you would translate approximately the same?
A. Approximately the same thing. Because for me they all look alike --- stuff like this."

Il fut soutenu en faveur de M. Caruana qu'il n'avait pas donné de renseignements faux et trompeurs en ce qui concerne ses condamnations pour crime, parce qu'il ne savait pas qu'il s'agissait de crimes: il croyait qu'il s'agissait de délits civils parce que son interprète l'avait innocemment trompé en utilisant des mots qui modifiaient le sens de la question, i.e. "Have you ever been in prison?" plutôt que "Have you ever been convicted of a crime or offence?" Notons que cette supposée erreur de traduction ne fut pas mentionnée à l'enquête; la question fut soulevée pour la première fois à l'appel.

Il est difficle d'évaluer la crédibilité de l'appelant sur ce point. Il ne fait pas de doute que, conformément aux lois italiennes pertinentes, M. Caruana fut condammé <u>in absentia</u> et il est possible qu'il ait eu une idée assez vague à savoir si ces infractions étaient criminelles their ordinary dictionary meaning, as it were, a geographical meaning, namely physically moving into Canada from outside that country. However, the phrase "seeking to come into Canada" which appears frequently in the Act, and is to be found in Section 23, in order to give effect to the scheme and intention of the Act as a whole, must be given a quasi-technical meaning, as including, but wider than, the meaning of the phrase "seeking admission". Since admission has no geographical connotation, the phrase "seeking to come into" applies to persons "seeking admission" regardless of their physical location or place of residence at the time such admission is sought". Mr. Caruana came into Canada when he was lawfully admitted to this country as a non-immigrant on September 19, 1966. There is no evidence as to what information was required of, or given by him, at this time, and certainly no evidence that he was ever asked at that time whether he had been convicted of a crime or offence, and if so, what his answer was.

In view of the interpretation of the words "come into" in Turpin v. Minister of Manpower and Immigration, Mr. Caruana cannot be said to have "come into" Canada when he applied for permenent residence on October 12, 1966. To be sure, he was "seeking to come into" Canada on that date, but that portion of section 19(1)(e)(viii) used in the deportation order made against him does not apply in such a case. The wording of the section is clear:

- "S. 19(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
  - (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
    - (viii) came into Canada or remains therein with a false or improperly issued passport, visa, medical certificate or other document pertaining to his admission or by reason of any false or misleading information, force, stealth or other fraudulent or improper means, whether exercised or given by himself or by any other person,"

Since the sole ground of deportation in respect of Mr. Caruana was that he "came into" Canada by reason of false and misleading information, and since no evidence whatsoever was adduced at the inquiry to support this ground, the appeal must be allowed.

Dated at Ottawa, this 8th day of December 1969. Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the appellant: Mes B. Pateras and M. H. Blank, Barristers; For the respondent: Me Alain V-achon, Barrister.

ou "civiles". Si la question qu'on lui a posé était "Have you been in jail?", il a donné une réponse honnête, du moins en ce qui concerne ces deux infractions. Quoique la crédibilité de son témoignage et de celui de M. Cuffaro sur ce point puisse être plus ou moins douteuse, leur témoignage ne fut pas contredit ni sérieusement ébranlé par le contre-interrogatoire et le doute doit être résolu en faveur de l'appelant.

Le mot "false" est défini comme suit dans le <u>Shorter Oxford Dictionary</u>:

- "1. Erroneous .... Incorrect
- 2. Purposely untrue, mendacious, deceitful.

L'étymologie du mot serait le verbe latin fallere, tromper.

La définition du mot "mislead" dans le même dictionnaire, est la suivante:

" to lead into error "

L'expression conjonctive "false <u>and</u> misleading", utilisée dans l'ordonnance d'expulsion en appel, implique un élément d'intention délictueuse, c'est-à-dire le fait que les renseignements donnés étaient sciemment erronés. Puisqu'il n'est pas suffisamment prouvé que M. Caruana ait donné des renseignements incorrects sachant qu'ils étaient faux et avec l'intention de tromper, il n'existe pas de preuve pour soutenir une partie importante de l'ordonnance d'expulsion.

L'expulsion de M. Caruana a été ordonnée pour un unique motif:

"You are a person described under paragraph (viii) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada by reason of false and misleading information"

D'après la preuve, il ne fait aucun doute qu'il n'est pas citoyen canadien et qu'il n'a pas acquis un domicile canadien aux termes de la loi sur l'Immigration.

Toutes les preuves apportées à l'enquête en ce qui concerne les renseignements supposément faux ou trompeurs portaient sur la demande de résidence permanente au Canada présentée par M. Caruana sur le formulaire IMM 690 signé en fait le 12 octobre 1966 et sur le même formulaire signé le 24 août 1967 et antidaté au 12 octobre 1966; dans les deux cas, M. Caruana a répondu "No" à la question "Have you... been convicted of a criminal offence?". La déclaration statutaire de M. Caruana en date du 24 août 1967 contient la même réponse à cette question, mais cette déclaration a été faite longtemps après l'entrée de M. Caruana au Canada

comme non-immigrant le 19 septembre 1966. On n'a présenté absolument aucune preuve quant à cette entrée et, étand donné le libellé de l'ordonnance d'expulsion, c'est à ce fait que devait se rapporter la preuve concernant les renseignements faux et trompeurs. Dans les raisons de la décision Turpin c. Minister of Manpower and Immigration, le président Scott déclarait ce qui suit (page 5): "It is clear from a study of the (Immigration) Act as a whole, that where the words "come into" are used... alone, for example in section 19(1)(e)(x) "came into Canada as a member of a crew" the words "come into" must be given their ordinary dictionary meaning, as it were, a geographical meaning, namely physically moving into Canada from outside that country. However, the phrase "seeking to come into Canada" which appears frequently in the Act, and is to be found in section 23, in order to give effect to the scheme and intention of the Act as a whole, must be given a quasitechnical meaning, as including, but wider than, the meaning of the phrase "seeking admission". Since admission has no geographical connotation, the phrase "seeking to come into" applies to persons "seeking admission" regardless of their physical location or place of residence at the time such admission is sought". M. Caruana est entré au Canada une fois légalement admis comme non-immigrant le 19 septembre 1966. Il n'y a aucune preuve portant sur les renseignements qui lui furent demandés ou qu'il donna à ce moment là et il n'existe certainement aucune preuve du fait qu'on lui ait demandé à ce moment-là s'il avait déjà été condamné pour un crime ou une infraction et de la réponse qu'il aurait donné à une telle question si elle lui avait été posée.

Étant donné l'interprétation des mots "come into" dans la décision Turpin v. Minister of Manpower and Immigration, on ne peut pas dire que M. Caruana est entré ("come into") au Canada lorsqu'il a demandé la résidence permanente le 12 octobre 1966. Bien entendu, il "cherchait à entrer au" Canada à cette date, mais la partie de l'article 19(1)(e) (viii)mentionnée dans l'ordonnance d'expulsion émise contre lui ne s'applique pas dans un tel cas. Le libellé de l'article est incontestable:

- "19.(1) Lorsqu'il en a connaissance, le greffier ou secrétaire d'une municipalité au Canada, dans laquelle une personne ci-après décrite réside ou peut se trouver un fonctionnaire à l'immigration ou un constable ou autre agent de la paix doit envoyer au directeur un rapport écrit, avec des détails complets, concernant
  - (e) toute personne, autre qu'un citoyen canadien ou une personne ayant un domicile canadien, qui
    - (viii) est entrée au Canada, ou y demeure, avec un passeport, un visa, un certificat médical ou autre document relatif à son admission qui est faux ou irrégulièrement délivré, ou par suite de quelque renseignement faux ou trompeur, par la force, clandestinement ou par des moyens frauduleux ou irréguliers, exercés ou fournis par elle ou par quelque autre personne."

Puisque l'unique motif d'expulsion dans le cas de M. Caruana venait du fait qu'il était entré au ("came into") Canada en raisons de renseignements faux et trompeurs, et puisque aucune preuve ne fut présentée à l'enquête pour appuyer ce motif, l'appel doit être accueilli.

Fait à Ottawa le 8 décembre 1969

Ont souscrit: Jean-Pierre Houle et Gérard Legaré.

Pour l'appelant: Mes B. Pateras et M.H. Blank;

Pour l'intimé: Me Alain Nadon.

24. Dr. Chung Ming LU (Henry C. LU) et uxor,

appellants,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 16, 1969; File: 69-392.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, Gérard Legaré.

Inquiry - substantial compliance with section 11 of Inquiries Regulations as to wife. - Authority of single Board member to hear appeal. - Immigration Act: 37(1); Immigration Inquiries Regulations: 11, Immigration Appeal Board Act: 10.

Held: Distinguishing the Moshos case, in the instant appeal, the wife was advised beforehand that her husband's application having been refused she could be included in a deportation order, and that she could attend the Inquiry with him; the inference was that if the evidence was insufficient no order would be issued. Appellants were represented by counsel. She was present throughout the Inquiry and was told that she had to answer the allegations under section 37(1). She was therefore "given an opportunity of establishing to an Immigration officer that (she) should not be so included" in her husband's order; there was substantial compliance with the provisions of the Immigration Act and Regulations and had sufficient warning in this case to enable her to put in her full answer and defence.

Also, a single member designated by the Chairman under Section 10 of the Immigration Appeal Board Act has the authority to hear an appeal in full including submissions and arguments of counsel.

The judgment of the Board was delivered by:

### A.B. Weselak:

These are the appeals of Dr. Chung Ming Lu or Henry C. Lu and his wife Mrs. Chung Ming Lu against a deportation order made by Special Inquiry Officer J. Wellsman on 10 March 1969 at the Canada Immigration Centre, Edmonton, Alberta, in the following terms:

- " i) you are not a Canadian citizen
  - ii) you are not a person with Canadian domicile
  - iii) you are a member of the prohibited class of persons described under paragraph (t) of section 5 of the Immigration Act in that you do not fulfill or comply with the conditions and requirements of the Immigration Regulations Part 1 by reason of the fact that

24.

Dr. Chung Ming LU (Henry C.LU) et uxor,

appelants,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 16 décembre 1969; Dossier: 69-392.

Coram: Mlle J.V. Scott, président, A.B. Weselak, Gérard Legaré.

Enquête - respect suffisant de l'article 11 du Règlement sur les enquêtes en ce qui concerne l'épouse - Compétence d'un membre unique de la Commission pour entendre l'appel - Loi sur l'immigration: 37(1); Règlement sur les enquêtes de l'immigration: 11; Loi sur la Commission d'appel de l'immigration: 10.

Arrêt: Contrairement à l'affaire Moshos, en l'instance l'épouse a été avertie à l'avance du refus de la demande de son mari, du fait qu'elle pourrait être incluse dans l'ordonnance d'expulsion et qu'elle aurait à se présenter à l'enquête avec son mari; l'inférence portait que si la preuve n'était pas suffisante, aucune ordonnance ne serait émise; les appelants étaient représentés par un conseiller. L'appelante a été présente tout au long de l'enquête et elle a été avertie qu'elle aurait à répondre à des allégations selon l'article 37(1). Il lui fut par conséquent donné l'occasion "de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas être incluse" dans l'ordonnance contre son mari; les dispositions de la Loi sur l'immigration et de son règlement furent suffisamment respectées et l'appelante dans ce cas a été avertie suffisamment à l'avance pour qu'elle puisse donner défense et réponse complète.

De plus, un membre unique nommé par le président en vertu de l'article 10 de la Loi sur la Commission d'appel de l'immigration a la compétence nécessaire pour entendre un appel en entier, y compris les soumissions et les arguments des conseillers juridiques.

Le jugement de la Commission fut rendu par:

### A.B. Weselak:

Appels d'une ordonnance d'expulsion rendue par l'enquêteur spécial J. Wellsman au Centre de l'immigration canadienne à Edmonton Alberta, le 10 mars 1969 contre le docteur Chung Ming Ly ou Henry C. Lu et son épouse Mme Chung Ming Lu. L'ordonnance d'expulsion est rédigée comme suit:

(a) Section 36 of the Immigration Regulations Part 1 in that you have failed to produce evidence to show that you are not a person described under paragraph (a) of subsection (1) of section 34 of said regulations, namely a person described under paragraph (f) of subsection (1) of section 7 of the Immigration Act, who is under contractual obligation made prior to his entry into Canada to return to the country of which you are a citizen and who is not the spouse of a Canadian citizen or a person lawfully admitted to Canada for permanent residence;

(b) you are not in possession of an unexpired passport issued to you by the country of which you are a subject or citizen as required by subsection (1) of section 27 of the Immigration Regulations;

(c) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of section 28 of said regulations;

(d) you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations.

I hereby order you to be detained and to be deported.

Mrs. CHUNG MING LU it is my opinion that you are a person described under subsection (1) of section 37 of the Immigration Act in that you are a dependent member of a family whose head has been ordered deported and in accordance with subsection (1) of section 37 of the Immigration Act you are included in this deportation order. I hereby order you to be detained and to be deported."

The appellants were present at the hearing of their appeals accompanied by their counsel Wm. Skoreyko, M.P. Written submissions were filed on behalf of the appellants by Messrs. Cooke & Shandling, Barristers and Solicitors. The respondent was represented by Mr. P. Betournay, Barrister.

The male appellant was born on September 3, 1936 at Taiwan in the Republic of China. His parents, one brother and one sister reside there. He arrived in Canada on 2nd July 1965 and was granted status under Section 7(1)(f) of the Immigration Act as a non-immigrant student to August 1, 1967 and extended to 31 July 1968. He attended school in Taiwan from 1943 to 1962 except for two years of experience as a school teacher and one year of employment as a research assistant. He then proceeded to Honolulu where he entered into a course of study under the East-West Program at the University of Hawai earning a Master's degree in Education in 1964. He was then employed by the University of Hawai as a research assistant from 1964 to 1965 at which time he proceeded to Canada.

i) you are not a Canadian citizen

ii) you are not a person with Canadian domicile
iii) you are a member of the prohibited class of
persons described under paragraph (t) of section
5 of the Immigration Act in that you do not
fulfill or comply with the conditions and requirements of the Immigration Regulations Part 1 by
reason of the fact that

- (a) Section 36 of the Immigration Regulations
  Part 1 in that you have failed to produce
  evidence to show that you are not a person
  described under paragraph (a) of subsection
  (1) of section 34 of said regulations, namely
  a person described under paragraph (f) of
  subsection (1) of section 7 of the Immigration
  Act, who is under contractual obligation made
  prior to his entry in Canada to return to the
  country of which you are a citizen and who is not
  the spouse of a Canadian citizen or a person lawfully admitted to Canada for permanent residence;
- (b) you are not in the possession of an unexpired passport issued to you by the country of which you are a subject or citizen as required by subsection (1) of section 27 of the Immigration Regulations;
- (c) you are not in possession of a valid and subsisting immigration visa issued to you by a visa officer as required by subsection (1) of section 28 of said regulations;
- (d) you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations.

I hereby order you to be detained and to be deported.

Mrs. CHUNG MING LU it is my opinion that you are a person described under subsection (1) of section 37 of the Immigration Act in that you are a dependant member of a family whose head has been ordered deported and in accordance with subsection (1) of section 37 of the Immigration Act you are included in this deportation order. I hereby order you to be detained and to be deported."

Les appelants étaient accompagnés à l'audition de leur appel par leur conseiller M. Wm. Shoreyko, député. Des arguments écrits en faveur des appelants ont été déposés par MM. Cooke et Shanding, avocats, M. P. Betournay, avocat, occupait pour l'intimé. He was a research assistant at the University of Alberta from 1965 to 1968. In June 1968 he completed all requirements for the degree of Doctor of Philosophy in the Department of Educational Foundations, University of Alberta. The degree was conferred in November 1968. He has now been appointed as a visiting Assistant Professor at the University of Calgary in the Department of Educational Foundations for the 1969-70 academic year.

The male appellant produced at the Inquiry Republic of China Passport issued June 20th, 1962 which had been twice extended, first on 27 November 1963 by the Chinese Consul General Office at Honolulu to expire May 26th, 1965 and again revalidated by the same office on November 12, 1964 to expire May 11th, 1966. The appellant had applied for a further extension but this had been refused at Vancouver, the reason therefor being contained in a letter filed as part of Exhibit R1 at the hearing of the appeal. This letter is as follows:

Consulate General of the Republic of China Vancouver, B.C., Canada

P-58/195

April 29, 1969.

Mr. J. T. Pasman, Appeals Officer, Home Services Branch, Canada Immigration Division, Department of Manpower and Immigration, Ottawa 2, Ontario.

Dear Mr. Pasman:

With reference to you letter No. chi 20927 dated April 16, 1969, concerning the case of Dr. Lu Chung Ming, we wish to confirm that Dr. Lu did apply to this office for the extension of the validity of his passport, but due to his failure to fulfil a pledge of returning to Taiwan at the end of a two-year study under the Sino-American Cultural Exchange Program at the East West Cultural Center of Hawaii University in 1964, his application has been rejected, and he is required to return to Taiwan.

As to his wife, she will have no difficulty in obtaining a visa from this office whenever her husband decides to go homeward.

We would greatly appreciate it if you would be good enough to keep us posted of the further development of the case.

Yours sincerely,
(sgd.)
Chi-Ping Peng
Consul General of China"

L'appelant est né le 3 septembre 1936 à Taiwan dans la République de Chine. Ses parents, un frère et une soeur, y demeurent encore. Il est arrivé au Canada le 2 juillet 1965 et on lui accorda le statut d'étudiant non-immigrant, prévu par l'article 7(1)(f) de la Loi sur l'immigration, jusqu'au ler août 1967, puis jusqu'au 31 juillet 1968. L'appelant a étudié à Taiwan de 1943 à 1962, à l'exception de deux années d'expérience comme instituteur et d'une année comme assistant de recherche. Il s'est ensuite rendu à Honolulu pour y entreprendre un programme d'étude sous le régime du East-West Program de l'Université d'Hawaii et il a obtenu sa maîtrise en éducation en 1964. Il a ensuite été employé comme assistant de recherche à l'Université d'Hawaii, de 1964 à 1965, après quoi il s'est rendu au Canada.

Il a été assistant de recherche à l'Université d'Alberta de 1965 à 1968. En juin 1968, il avait satisfait à toutes les exigences du doctorat en Philosophie du <u>Department of Educational Foundations</u> de l'Université d'Alberta. Il reçut ce grade en novembre 1968. Il a depuis lors été nommé professeur adjoint invité au <u>Department of Educational Foundations</u> de l'Université de Calgary pour <u>l'année scolaire 1969-1970</u>.

L'appelant a présenté à l'enquête un passeport de la République de Chine délivré le 20 juin 1962 et deux fois renouvelé, d'abord le 27 novembre 1963 par le Consulat général de Chine à Honolulu jusqu'au 26 mai 1965 puis le 12 novembre 1964 jusqu'au 11 mai 1966. L'appelant a demandé un autre renouvellement mais cette requête lui fut refusée à Vancouver. La raison de ce refus est contenue dans une lettre qui fait partie de la pièce à l'appui Rl à l'audition de l'enquête. Cette lettre est rédigée comme suit:

Consulate General of the Republic of China Vancouver, B.C., Canada

P-58/195

April 29, 1969.

Mr. J. T. Pasman,
Appeals Officer,
Home Services Branch Division,
Department of Manpower and Immigration,
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Dear Mr. Pasman:

With reference to your letter No. CHI 20927 dated April 16, 1969, concerning the case of Dr. Lu Chung Ming, we wish to confirm that Dr. Lu did apply to this office for the extension of the validity of his passport, but due to his failure to fulfil a pledge of returning to Taiwan at the end of a two-year study under the Sino-American Cultural Exchange Program at the East West Cultural Center of Hawaii University in 1964, his application has been rejected, and he is required to return to Taiwan.

The male appellant filed an application for permanent residence on 16 July 1968. This application was refused and on December 6th, 1968, a Section 23 report was issued citing Sections 36, 34(1)(a), 27(1), 28(1) and 29(1) of the Immigration Regulations. An Inquiry followed on the 20th January 1969, was resumed March 10th, 1969 when a deportation order was resumed March 10th, 1969 when a deportation order was made in respect of the male appellant citing as grounds Section 5(t) of the Immigration Act coupled with 34(1)(a), 27(1), 28(1) and 29(1) of the Immigration Regulations.

Section 5(t) of the Immigration Act provides:

- "5. No person, other than a person referred to in subsection (2) of section 7, shall be admitted to Canada if he is a member of any of the following classes of persons:
  - (t) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any order lawfully made or given under this Act or the regulations."

Section 27 of the Immigration Regulations provides:

- "27(1) Every immigrant or non-immigrant seeking admission to Canada shall be in possession of an unexpired passport issued to him by the country of which he is a subject or citizen.
  - (2) Subsection (1) does not apply to the following persons:
    - (a) a citizen of the United States;
    - (b) a person who
      - (i) has been legally admitted to the United States for permanent residence, and
      - (ii) is seeking admission to Canada from the United States;
    - (c) a member of the crew of a vehicle arriving in Canada;
    - (d) a member of the Armed Forces of any North Atlantic Treaty Organization country; or
    - (e) a person who
      - (i) is stateless or is a refugee from his country of origin or of nationality,
      - (ii) is unable to obtain a passport or is unwilling, for good and sufficient reason, to apply for one,
      - (iii) is in possession of a certificate of identity, and

As to his wife, she will have no difficulty in obtaining a visa from this office whenever her husband decides to go homeward.

We would greatly appreciate it if you would be good enough to keep us posted of the further development of the case.

Yours sincerely, (sgd.) Chi-Ping Peng Consul General of China"

L'appelant a demandé la résidence permanente le 16 juillet 1968. Sa demande fut refusée et le 6 décembre 1968, un rapport fut soumis selon l'article 23; ce rapport mentionnait les articles 36, 34(1)(a), 27(1), 28(1) et 29(1) du Règlement sur l'immigration. Une enquête s'ensuivit le 20 janvier 1969 et fut reprise le 10 mars 1969, date à laquelle fut rendue l'ordonnance d'expulsion contre l'appelant; l'ordonnance mentionnait comme motifs l'article 5(t) de la Loi sur l'immigration avec les articles 34(1)(a), 27(1), 28(1) et 29(1) du Règlement sur l'immigration.

L'article 5(t) de la Loi sur l'immigration prévoit que:

- "5. Nulle personne autre qu'une personne mentionnée au paragraphe (2) de l'article 7 ne doit être admise au Canada si elle est membre de l'une des catégories suivantes:
  - (t) les personnes qui ne peuvent remplir ni oberserver ou qui ne remplissent ni n'observent, quelque condition ou prescription de la présente loi ou des règlements, ou des ordonnances légitimement établies au terme de la présente loi ou des règlements.

Selon l'article 27 du Règlement sur l'immigration:

- "27(1) Tout immigrant ou non-immigrant qui cherche l'admission au Canada doit être en possession d'un passeport nonpérimé qui lui a été délivré par le pays dont il est le ressortissant ou le citoyen.
  - (2) Le paragraphe (1) ne s'applique pas aux personnes suivantes:

(a) un citoyen des États-Unis

(b) une personne qui

- (i) a été admise légalement aux Etats-Unis pour y résider en permanence, et
- (ii) cherche a obtenir l'admission au Canada en provenance des États-Unis;
- (c) un membre de l'équipage d'un véhicule arrivant au
- (d) un membre des forces armées de tout pays membre de l'Organisation du traité de l'Atlantique Nord; ou

(iv) establishes to the satisfaction of any immigration officer that he can return to the country from which he seeks to come to Canada or that he can go to some other country."

Section 7(2) of the Immigration Act provides:

- "7(2) In addition to the persons described in subsection (1), the following persons may be allowed to enter and remain in Canada as non-immigrants:
  - (a) persons authorized by the Minister to enter Canada for treatment and care at any health resort, hospital, sanitarium, asylum or other place or institution for their cure and care and, after entering Canada, while they are actually under such treatment and care;
  - (b) persons passing in transit through Canada under excort or guard; and
  - (c) holders of a permit."

The male appellant is not such a person as is described in Section 7(2) of the Immigration Act or in 27(2) of the Immigration Regulations therefore on a reading together of Section 5(t) of the Immigration Act and Regulations 27(1), the Board finds that

No person shall be admitted to Canada if he is not in possession of an unexpired passport issued to him by the country of which he is a subject or a citizen.

The male appellant's passport expired on May 11th, 1966. He initially sought admission on July 16th, 1968 and therefore falls within the prohibited class described in Section 5(t) of the Immigration Act.

This ground in the order alone is sufficient to support a valid deportation order. Note: 'No person shall be admitted to Canada".

The Supreme Court of Canada in

De Marigny v. Langlais 1948 S.C.R. 155 at 160 Kellock J. stated

"In my opinion if any ground exists which disentitles the appellant to entry upon which the Board based its decision this is sufficient"

and in Espaillat-Rodriguez v. The Queen 1964 S.C.R. at p. 6, where the grounds in the order were only based on Regulations 28(1) and 29(1) of the Immigration Act Abbot J. stated:

(e) une personne qui

 (i) est un apatride ou est une personne qui a quitté son pays d'origine ou de nationalité en qualité de réfugiée,

(ii) est incapable d'obtenir un passeport ou ne veut pas, pour une raison bonne et suffisante,

en demander un,

(iv) établit à la satisfaction d'un fonctionnaire à l'immigration qu'elle peut retourner dans le pays d'où elle cherche à venir au Canada ou qu'elle peut se rendre en quelque autre pays."

L'article 7 de la Loi sur l'immigration prévoit que:

"7(2) Outre les personnes décrites au paragraphe (1), les personnes suivantes peuvent être admises à entrer et demeurer au Canada comme non-immigrants, savoir:

- (a) les personnes autorisées par le Ministre à entrer au Canada pour subir un traitement et recevoir des soins à quelque station climatique, hôpital, sanatorium, asile ou autre endroit ou institution, en vue de leur guérison et de leur soin, et, après être entrées au Canada, pendant qu'elles reçoivent réellement ce traitement et ces soins;
- (b) les personnes qui traversent le Canada en cours de route, sous garde ou escorte; et

(c) les détenteurs d'un permis.

L'appelant n'est pas une personne décrite à l'article 7(2) de la Loi sur l'immigration ni à l'article 27(2) du Règlement sur l'immigration; par conséquent, en réunissant l'article 5(t) de la Loi sur l'immigration et 27(1) du Règlement, la Commission déclare que:

Nulle personne ne doit être admise au Canada si elle n'est pas en possession d'un passeport non périmé qui lui a été délivré par le pays dont elle est la ressortissante ou le citoyen.

Le passeport de l'appelant a expiré le 11 mai 1966. Il a fait sa première demande d'admission le 16 juillet 1968 et il est par conséquent membre de la catégorie interdite par l'article 5(t) de la Loi sur l'immigration.

Ce seul motif de l'ordonnance suffit à étayer une ordonnance d'expulsion valide. À remarquer: 'Nulle personne ne doit être admise au Canada''. Le juge Kellock, de la Cour suprême du Canada, dans l'instance DeMarigny c. Langlais 1948 R.C.S. 155 à 160, déclarait ceci: "It is sufficient to support the Deportation Order that the appellant had failed to comply with either of the said sections".

With respect to the ground in the order basec on Section 34(1)(a) of the Regulations which provides:

- "34(1) In this section "applicant in Canada" means a person who has been allowed to enter and remain in Canada as a non-immigrant under subsection
  - (1) of section 7 of the Act other than
  - (a) a person in paragraph (f) or (i) of that subsection who is under a contractual obligation, made prior to his entry into Canada, to return to the country of which he is a citizen and who is not the spouse of a Canadian citizen or a person lawfully admitted to Canada for permanent residence."

Lengthy submissions were made by Counsel for the appellant and counsel for the respondent dealing with the question as to whether there was any contractual obligation on the appellant to return to Taiwan on completion of his studies or whether there was in fact any such contract.

The Board however having found the ground in the order based on Section 27(1) valid and being sufficient in itself to support a deportation order declines to resolve this issue.

The appellant admitted at the Inquiry that he was not in possession of an immigrant visa or of a medical certificate in the prescribed form. The Board therefore finds, in the circumstances, that the grounds in the order based on Sections 28(1) and 29(1) of the Regulations are valid.

Having found three of the four grounds in the order valid the Board finds that the Deportation Order as a whole has been made in accordance with the Immigration Act and Regulations thereunder and dismisses the appeal of the male appellant under Section 14 of the Immigration Appeal Board Act.

The female appellant having been included in her husband's application for permanent residence which was rejected, was ordered deported by virtue of Section 37(1) of the Immigration Act which provides:

"37(1) Where a deportation order is made against the head of a family, all dependent members of the family may be included in such order and deported under it."

"In my opinion if any ground exists which disentitles the applicant to entry upon which the Board based its decision this is sufficient."

Dans l'instance Espaillat-Rodriquez c. la Reine, 1964, R.C.S., p. 6, alors que les motifs de l'ordonnance d'expulsion n'étaient fondés que sur les articles 28(1) et 29(1) du Règlement, le juge Abbot déclarait ceci:

"It is sufficient to support the Deportation Order that the appellant had failed to comply with either of the said sections".

Un des motifs de l'ordonnance se fonde sur l'article 34(1) (a) du Règlement, qui prévoit ce qui suit:

"34(1) Au présent article, "requérant se trouvant au Canada" désigne une personne qui a obtenu la permission d'entrer et de demeurer au Canada, à titre de non-immigrant, aux termes du paragraphe

(1) de l'article 7 de la Loi, sauf

(a) une personne mentionnée aux alinéas f) ou i) audit paragraphe qui est astreinte par contrat intervenu avant son entrée au Canada, à retourner au pays dont elle est citoyen et qui n'est pas le conjoint d'un citoyen canadien ou une personne légalement admise au Canada en vue d'y résider en permanence;"

Le conseiller juridique de l'appelant et celui de l'intimé ont longuement débattu la question de savoir si l'appelant était astreint par contrat à retourner à Taiwan à la fin de ses études ou s'il existait en fait un tel contrat.

La Commission cependant, ayant trouvé le motif de l'ordonnance qui se fonde sur l'article 27(1) valide et suffisant en soi pour étayer l'ordonnance d'expulsion, refuse de trancher cette question.

L'appelant a avoué à l'enquête n'être pas en possession d'un visa d'immigrant et d'un certificat médical dans la forme prescrite La Commission décide par conséquent que dans les circonstances, les motifs de l'ordonnance fondés sur les articles 28(1) et 29(1) du Règlement sont valides.

Ayant trouvé valides trois des quatre motifs de l'ordonnance, la Commission soutient que l'ensemble de l'ordonnance d'expulsion est conforme à la Loi sur l'immigration et à son règlement d'application et elle rejette l'appel de l'appelant en vertu de l'article 14 de la Loi sur la Commission d'appel de l'Immigration.

The female appellant was born in Japan on 15 June 1945. Her parents and one sister are residing in Japan. One sister is in the United States of America. On the 21st of June 1965 she was married in Honolulu to the male appellant. She has twelve years of education in Japan and was employed in a clerical capacity by the Japanese Government. There has been an issue of this marriage, a son, born in Canada in March 1969.

When asked at the Inquiry whether she was fully dependent upon her husband, the female appellant replied in the affirmative. The Board on review of the evidence finds that she is dependent upon her husband and was properly included under Section 37(1) of the Immigration Act in the Deportation Order.

However in view of the decision of the Supreme Court of Canada (unreported) in the appeal of Smaro Moshos the Board must consider if the provisions of Section 11 of the Immigration Inquiries Regulations have been complied with. Section 11 provides as follows:

"11. No person shall, pursuant to subsection (1) of section 37 of the Act, be included in a deportation order unless the person has first been given an opportunity of establishing to an immigration officer that he should not be so included."

In the Moshos appeal at Page 6 of the Reasons for Judgment by Mr. Justice Martland, it is stated:

"I have already quoted that which took place between the Special Inquiry Officer and the appellant when she appeared as a witness at the inquiry. In my opinion there was not a sufficient compliance with this section. The appellant's status at that inquiry was as a witness in an inquiry concerning John Moshos. She was not there throughout the inquiry.

It is true that the Special Inquiry Officer read the provisions of s. 37(1) to her and told her that "in view of this section of the Regulations (sic), in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order." He also asked her if she wished to secure counsel "before giving evidence." He then proceeded to question her.

However, at no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of  $s.\ 37(1)$  to her, when she was on the stand as a witness,

L'expulsion de l'appelante, qui avait été incluse dans la demande de résidence permanente de son mari, demande qui a été refusée, se fonde sur l'article 37(1) de la Loi sur l'immigration qui stipule que:

"37(1) Lorsqu'une ordonnance d'expulsion est rendue contre le chef d'une famille, tous les membres à charge de la famille peuvent être inclus dans l'ordonnance et expulsés sous son régime."

L'appelante est née au Japon le 15 juin 1945. Ses parents et une soeur demeurent au Japon. Une autre soeur demeure aux États-Unis d'Amérique. Elle a épousé l'appelant à Honolulu le 21 juin 1965. Elle a fait douze années de scolarité au Japon et elle a été employée de bureau pour le gouvernement japonais. Elle a donné naissance à un fils au Canada en mars 1969.

Lorsqu'on lui a demandé à l'enquête si elle était entièrement à charge à son mari, elle a répondu que oui. La Commission a trouvé, à l'étude de la preuve, qu'elle est à charge de son mari et qu'on a eu raison de l'inclure dans l'ordonnance d'expulsion en vertu de l'article 37(1) de la Loi sur l'immigration.

Cependant, selon la décision de la Cour suprême du Canada (non publiée) dans l'appel de Smaro Moshos, la Commission doit voir à ce que l'article ll du Règlement sur les enquêtes de l'immigration soit respecté. L'article ll prévoit ce qui suit:

"11. Nulle personne ne sera incluse dans une ordonnance d'expulsion, conformément au paragraphe (1) de l'article 37 de la Loi, sans avoir eu d'abord l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas y être incluse."

Dans l'appel Moshos, à la page 6 des raisons de la décision de M. le juge Martland, il est dit ceci:

"I have already quoted that which took place between the Special Inquiry Officer and the appellant when she appeared as a witness at the inquiry. In my opinion there was not a sufficient compliance with this section. The appellant's status at that inquiry was as a witness in an inquiry concerning John Moshos. She was not there throughout the inquiry.

It is true that the Special Inquiry Officer read the provisions of s. 37(1) to her and told her that "in view of this section of the Regulations (sic), in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such

followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity.

In my opinion the deportation order was made against the appellant and the children without complying with s. 11 of the Immigration Inquiries Regulations. In view of this conclusion, it is unnecessary to consider the other grounds of appeal submitted on behalf of the appellants.

The appeal should, therefore, be allowed and the deportation order, in so far as it relates to the appellant and the children, should be set aside."

In De Marigny v. Langlais 1948 S.C.R. at page 165 Kellock J. stated:

"In the administration of the Immigration Act, what is to be looked for and required is a compliance in substance with its provisions. The case of Samejima v. Rex (1) shows that this Court will not hesitate to condemn "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears."

The record reveals that on December 11th, 1968 a letter was sent to the female appellant (Exhibit C) by the respondent which advised her that her husband's application for permanent residence had been refused. The grounds for refusal were then stated and that if he was a person so described a deportation order would be issued against him. The letter goes on to say:

"Subsection (1) of section 37 of the Immigration Act states that where a deportation order is made against the head of a family all dependent members of the family may be included in such order and deported under it. Because of the foregoing you are required to attend the Immigration inquiry on January 20, 1969 at 9:15 a.m. at which time you will be examined in relation to subsection (1) of section 37 of the Immigration Act. If your husband is ordered deported and should you be found to be a person described as above then a deportation order will be issued against you.

Pursuant to subsection (2) of section 27 of the Immigration Act you may be represented by counsel at your own expense. I am enclosing herewith Form Imm. 689 which explains this right to you.

When you call at this office please bring this letter for file reference purposes as well as your passport and any other documents of identification in your possession that might relate to you or your family.

deportation order." He also asked her if she wished to secure counsel "before giving evidence." He then proceeded to question her.

However, at no point was she told that she had the right to an opportunity to establish that she should not be included in the order. I do not regard the mere reading of s. 37(1) to her, when she was on the stand as a witness, followed by questioning by the Special Inquiry Officer, as constituting the giving of such an opportunity.

In my opinion the deportation order was made against the appellant and the children without complying with s. 11 of the Immigration Inquiries Regulations. In view of this conclusion, it is unnecessary to consider the other grounds of appeal submitted on behalf of the appellants.

The appeal should, therefore, be allowed and the deportation order, in so far as it relates to the appellant and the children, should be set aside."

Dans DeMarigny c. Langlais 1948 R.C.S., à la page 165, le juge Kellock déclare ceci:

"In the administration of the Immigration Act, what is to be looked for and required is a compliance in substance with its provisions. The case of Samejima v. Rex (1) shows that this Court will not hesitate to condemm "hugger-mugger" proceedings, as Sir Lyman Duff called them, or proceedings in which a defect in substance appears."

Le dossier révêle que le 11 décembre 1968, une lettre (pièce "C") était envoyée à l'appelante par l'intimé, qui lui annonçait que la demande de résidence permanente de son mari avait été refusée. Les motifs du refus y étaient exposés et on l'avertissait que s'il répondait à cette description il serait expulsé. La lettre se poursuivait ainsi:

"Subsection (1) of section 37 of the Immigration Act states that where a deportation order is made against the head of a family all dependent members of the family may be included in such order and deported under it. Because of the foregoing you are required to attend the Immigration inquiry on January 20, 1969 at 9:15 a.m. at which time you will be examined in relation to subsection (1) of section 37 of the Immigration Act. If your husband is ordered deported and should you be found to be a person described as above then a deportation order will be issued against you.

Pursuant to subsection (2) of section 27 of the Immigration Act you may be represented by counsel at your own expense. I am enclosing herewith Form Imm. 689 which explains this right to you.

Should you wish to effect departure from Canada rather than appear at an Immigration inquiry this letter should be handed to a Canadian Immigration Officer at the Port of your departure. He will return the letter to this office so that I may be aware that you have left Canada."

The Section 23 report dated 6 December 1968 issued in respect of the male appellant makes no reference to the female appellant. There does not appear to be in the record any Section 23 report in respect of the female appellant.

The female appellant was present throughout her husband's inquiry and the record of the Minutes discloses:

At Page 2

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU CHUNG MING

Mrs. Lu you were asked to be present at this Inquiry because subsection (1) of Section 37 of the Immigration Act dictates that the dependent members of a family of a person ordered deported may be included in that deportation order. Should a deportation order be issued against Dr. Lu following this inquiry then it may also be my duty to include you in that deportation order.

- Q. Do you understand the cause for this inquiry and the possible results?
- A. Yes."

and further on

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU

Mrs. Lu in a letter dated December 11th, 1968 you were advised that an Immigration Inquiry would be held concerning Dr. Lu and that as a dependent you may be included in any deportation order that may be issued. You were also advised that in accordance with subsection (2) of Section 27 of the Immigration Act you have the right to be represented by counsel.

- Q. Would you examine this letter and tell me whether you received this correspondence?
- A. Yes.
- Q. Do you wish to be represented by counsel?
- A. Yes."

and on Page 3

When you call at this office please bring this letter for file reference purposes as well as your passport and any other documents of identification in your possession that might relate to you or your family.

Should you wish to effect departure from Canada rather than appear at an Immigration inquiry this letter should be handed to a Canadian Immigration Officer at the Port of your departure. He will return the letter to this office so that I may be aware that you have left Canada."

Le rapport prévu à l'article 23 concernant l'appelant, ne date du 6 décembre 1968, ne mentionne pas l'appelante. Le dossier ne semble contenir aucun rapport prévu à l'article 23 concernant l'appelante.

L'appelant a été présente tout au long de l'enquête sur son mari et le procès-verbal révèle ce qui suit (page 2):

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU CHUNG MING

Mrs. Lu you were asked to be present at this Inquiry because subsection (1) of Section 37 of the Immigration Act dictates that the dependant members of a family of a person ordered deported may be included in that deportation order. Should a deportation order be issued against Dr. Lu following this inquiry then it may also be my duty to include you in that deportation order.

Q. Do you understand the cause for this inquiry and the possible results?

A. Yes.

Plus bas:

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU

Mrs. Lu in a letter dated December 11th, 1968 you were advised that an Immigration Inquiry would be held concerning Dr. Lu and that as a dependant you may be included in any deportation order that may be issued. You were also advised that in accordance with subsection (2) of Section 27 of the Immigration Act you have the right to be represented by counsel.

- Q. Would you examine this letter and tell me whether you received this correspondence?
- A. Yes.
- Q. Do you wish to be represented by counsel?
- A. Yes."

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU

- Q. Will you please sign the carbon copies of form IMM. 689 indicating yes you wish to be represented by counsel?
- A. Mrs. Lu complies with the Special Inquiry Officer's request and signs form IMM. 689.
- Q. Is your counsel present?
- A. Pardon, I do not understand.
- Q. Well you have told me that you wish to be represented by counsel, is your counsel here?
- A. Yes."

and on Page 16

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU CHUNG MING

- Q. Mrs. Lu are you willing to give evidence under oath at this inquiry?
- A. I beg your pardon.
- Q. Do you believe when you swear on a Christian Bible that you will tell the truth, that this is a binding contract?
- A. Yes I do.
- Q. Do you believe in the Christian religion?
- A. No.
- Q. I do not think that this belief would be valid and under these circumstances I will ask you if you are willing to affirm to answer questions truthfully knowing that evidence given by affirmation carries the same force and effect as if evidence given under oath by virtue of the Canada Evidence Act. Are you willing to give evidence by affirmation?
- A. Yes.

(Mrs. Lu is sworn in)."

and on Page 19

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU

- Q. Mrs. Lu is there any statement that you wish to make at this time?
- A. No."

and at the conclusion of the Inquiry at Page 27

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU

- Q. Mrs. Lu are there any comments you wish to make at this time?
- A. No."

### Page 3:

# "BY THE SPECIAL INQUIRY OFFICER TO MRS. LU

- Q. Will you please sign the carbon copies of form IMM. 689 indicating yes you wish to be represented by counsel?
- A. Mrs. Lu complies with the Special Inquiry Officer's request and signs form IMM. 689.
- Q. Is your counsel present?
- A. Pardon, I do not understand.
- Q. Well you have told me that you wish to be represented by counsel, is your counsel here?
- A. Yes."

## Page 16:

# "BY SPECIAL INQUIRY OFFICER TO MRS. LU CHUNG MING

- Q. Mrs. Lu are you willing to give evidence under oath at this inquiry?
- A. I beg your pardon.
- Q. Do you believe when you swear on a Christian Bible that you will tell the truth, that this is a binding contract?
- A. Yes I do.
- Q. Do you believe in the Christian religion?
- A. No.
- Q. I do not think that this belief would be valid and under these circumstances I will ask you if you are willing to affirm to answer questions truthfully knowing that evidence given by affirmation carries the same force and effect as if evidence given under oath by virtue of the Canada Evidence Act. Are you willing to give evidence by affirmation?
- A. Yes.

(Mrs. Lu is sworn in)."

### Page 19:

### "BY SPECIAL INQUIRY OFFICER TO MRS. LU

 $Q_{\cdot\cdot}$  Mrs. Lu is there any statement that you wish to make at this time? A. No."

and at the conclusion of the Inquiry at Page 27

Considering the authorities quoted and the evidence of record, has there been substantial compliance with Section 11 of the Immigration Inquiries Regulations?

In the Moshos appeal (supra) Justice Martland held that the mere reading of Section 37(1) to her when she was on the witness stand, advising her as to her right to counsel, followed by questioning by the Special Inquiry Officer and her not being present throughout the Inquiry, did not constitute compliance with Section 11 of the Immigration Inquiries Regulations. In other words, she was not given an opportunity of establishing to an Immigration officer that she should not be so included. In the Moshos case it would appear that prior to the Inquiry Mrs. Moshos was not aware of the allegations against her and that at the Inquiry she was not informed that she could put in a defence to such allegation.

In the instant appeal, the female appellant was advised on December 11th, 1968 that her husband's application for permanent residence had been refused. She was told in that letter that she could, under Section 37(1), be included in the order. The letter stated

"If your husband is ordered deported and should you be found to be a person described as above then a deportation order will be issued against you".

and advised to attend the Inquiry with her husband on January 20, 1969. She was here told prior to the Inquiry of the allegation against her; she was also told that "should you be found to be a person described as above then a deportation order will be issued against you".

The obvious inference is that if upon the evidence received at the Inquiry you are not so found, then a deportation order will not be issued against you. In other words she was told that the issuance of the deportation order depended upon the evidence at the Inquiry and that she had the opportunity to rebut the allegation under Section 37(1).

The appellants then, it appears, consulted their solicitor who again would draw this inference. Unlike Mrs. Moshos, the female appellant was present throughout her husband's Inquiry also at the outset of the Inquiry she was told on page 2 of the Minutes of Inquiry, not that she was present as a witness, but to answer the allegation under Section 37(1). Her counsel acted for her husband throughout his Inquiry and acted for her while she was examined at the Inquiry.

The facts in the instant appeal differ substantially from the facts in the appeal of Mrs. Moshos to the Supreme Court of Canada. Therefore the Board finds that this case can be distinguished from the Moshos case and finds that the appellant had "been given an opportunity of establishing to an Immigration officer that he should not be so included" (Section 11 of the Immigration Inquiries

## "BY SPECIAL INQUIRY OFFICER TO MRS. LU

Q. Mrs. Lu are there any comments you wish to make at this time?

Étant donné les autorités citées et la preuve au dossier, l'article 11 du Règlement sur les enquêtes de l'Immigration a-t-il été suffisamment respecté?

Dans l'appel Moshos ci-devant cité , le juge Martland avait décidé que le fait de lire l'article 37(1) à l'appelante lorsqu'elle était à la barre des témoins, de l'informer de son droit à un conseiller juridique, puis l'interrogatoire de l'enquêteur spécial et l'absence de l'appelante tout au long de l'enquête ne répondait pas aux exigences de l'article ll du Règlement sur les enquêtes de l'immigration. En autres mots, l'appelante n'avait pas eu l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne devait pas être incluse. Dans le cas Moshos, il semble qu'avant l'enquête Mme Moshos ne savait pas qu'elle était visée par ces allégations et qu'elle ne fut pas informée de son droit de se défendre contre ces allégations au cours de l'enquête.

En instance, l'appelant a été avertie le 11 décembre 1968 que la demande de résidence permanente de son mari avait été refusée. La lettre lui signifiait qu'elle pouvait être incluse dans l'ordonnance. La lettre déclarait ceci:

"If your husband is ordered deported and should you be found to be a person described as above then a deportation order will be issued against you."

et qu'elle lui conseillait de se présenter à l'enquête avec son mari le 20 janvier 1969. C'est à ce moment, avant l'enquête, qu'on l'informa de l'allégation qui la visait; on lui disait aussi que "should you be found to be a person described as above then a deportation order will be issued against you."

Ce qui laisse évidenment inférer que s'il n'était pas prouvé à l'enquête qu'elle était une telle personne, aucune ordonnance d'expulsion ne serait rendue contre elle. En autres mots, il lui a été dit que l'émission d'une ordonnance d'expulsion dépendait de la preuve à l'enquête et qu'elle avait l'occasion de réfuter l'allégation en vertu de l'article 37(1).

Les appelants semblent avoir ensuite consulté leur avocat, qui a pu lui aussi tirer cette inférence. Contrairement à Mme Moshos, l'appelante a été présente tout au long de l'enquête sur son mari et elle fut aussi avertie, à la page 2 du procès-verbal de l'enquête, qu'elle n'était pas là comme témoin mais pour se défendre contre une allégation selon l'article 37(1). Son avocat a représenté son mari tout au long de l'enquête et l'a représenté, elle, lorsqu'elle fut interrogée à l'enquête.

Regulations). There had been compliance in substance with the provisions of the Immigration Act and Regulations thereunder (De Marigny v. Langlais 1948 S.C.R. at page 165) and had sufficient warming in this case to enable her to put in her full answer and defence.

The Board therefore finds that the female appellant was properly included in her husband's order by virtue of Section 37(1) of the Immigration Act and dismisses her appeal.

At the outset of the hearing before the Board, counsel for the respondent questioned the jurisdiction of the Member of the Board, Mr. A.B. Weselak, to hear the appeal in full. What transpired is recorded in the transcript of the hearing on page 1.

### "CHAIRMAN:

This is an appeal of Lu Chung Ming and his wife. This appeal is being heard under Section 10 of the Immigration Appeal Board Act. The Chairman may authorize any one Member to take evidence and the Member then has to report to a quorum of the Board, another two Members. The counsel will be sent transcripts of the evidence. The quorum will then consider the transcript and record and my report and then you will be advised of the decision. I note that Mr. Skoreyko is here for the appellant and Mr. Betournay is representing the respondent. Are you ready to proceed, gentlemen?

#### MR. BETOURNAY:

May I say something for the record, Mr. Chairman? I am of course aware of the ruling on Section 10. There is a --on behalf of the respondent, as counsel for the respondent, it is my duty of course to avoid, as much as possible, prejudicing the respondent's position and any right of appeal the respondent might have at a later date. As I say, I am aware all right of the Board's ruling to Section 10 of the Immigration Appeal Board Act, but for the record I would ask you to allow me to submit that, as I read the Act, any matter brought before the Board is to be heard by the Board. That is, a panel having a quorum as provided in Section 6 of the Act and if there is no panel composed of three Members, then there is not a Board sitting to hear an appeal, in my respectful submission, under the terms of the Act as required by the Act. Now, on this appeal, of course, both counsel are appearing to argue the merits of the appeal and I take it we would not ourselves be giving evidence in the language of Section 10 but rather submitting arguments. Now, Section 10 provides that one Member may receive evidence relating to an appeal but my submission is that this is, perhaps, not authority for a Member to hear a full dress appeal.

Les faits en instance diffèrent sensiblement des faits de l'appel de Mme Moshos devant la Cour suprême du Canada. Par conséquent, la Commission estime que cette affaire est différente de l'affaire Moshos et déclare que l'appelante a "eu d'abord l'occasion de prouver à un fonctionnaire de l'immigration qu'elle ne doit pas être incluse" article 11 du Règlement sur les enquêtes de l'immigration). Les dispositions de la Loi sur l'immigration et de son règlement ont été suffisamment respectées (DeMarigny c. Langlais 1948 R.C.S., page 165) et l'appelante a été suffisamment bien informée pour pouvoir donner pleine réponse et défense.

La Commission décide par conséquent que l'appelante fut régulièrement incluse dans l'ordonnance émise contre son mari en vertu de l'article 37(1) de la Loi sur l'immigration et rejette son appel.

Au début de l'audition devant la Commission, l'avocat de l'intimé a contesté la compétence du membre de la Commission M. A.B. Weselak pour entendre l'appel en entier. Ce qui en est résulté paraît à la page 1 du procès-verbal de l'audition:

#### "CHAIRMAN:

This is an appeal of Lu Chung Ming and his wife. This appeal is being heard under Section 10 of the Immigration Appeal Board Act. The Chairman may authorize any one Member to take evidence and the Member then has to report to a quorum of the Board, another two Members. The counsel will be sent transcripts of the evidence. The quorum will then consider the transcript and record and my report and then you will be advised of the decision. I note that Mr. Skoreyko is here for the appellant and Mr. Betournay is representing the respondent. Are you ready to proceed, gentlemen?

#### MR. BETOURNAY:

May I say something for the record, Mr. Chairman? I am of course aware of the ruling on Section 10. There is a -- on behalf of the respondent, as counsel for the respondent, it is may duty of course to avoid, as much as possible, prejudicing the respondent's position and any right of appeal the respondent might have at a later date. As I say, I am aware all right of the Board's ruling to Section 10 of the Immigration Appeal Board Act, but for the record I would ask you to allow me to submit that, as I read the Act, any matter brought before the Board is to be heard by the Board. That is, a panel having a quorum as provided in Section 6 of the Act and if there is no panel composed of three Members, then there is not a Board sitting to hear an appeal, in my respectful submission, under the terms of the Act as required by the Act. Now, on this appeal, of course, both counsel are appearing to argue the merits of the appeal and I take it we would not ourselves be giving evidence in the language of Section 10 but rather submitting arguments. Now, Section 10 provides that one Member may receive evidence relating to an appeal but my submission is that this is, perhaps, not authority for a Member to hear a full dress appeal.

#### CHAIRMAN:

If you read the second part of Section 10, subsection 1, "...and that Member has and may exercise all of the powers of the Board in relation to the hearing of the appeal." It's pretty broad.

### MR. BETOURNAY:

The distinction that I see, Mr. Chairman, is that between the receiving of evidence and the hearing of an appeal and the Act would, of course, include the argument by counsel---

#### CHAIRMAN:

That is why I referred to the second part of this section.

#### MR. BETOURNAY:

---but I prefer to abide by your ruling.

### CHAIRMAN:

The remarks will be noted, Mr. Betournay, and brought to the attention of the Chairman.

#### MR. BETOURNAY:

Thank you. So I am expected to carry on and make the submissions on the behalf of the respondent in this appeal?

#### CHAIRMAN:

If we find we are wrong, we may have to come back.

#### MR. BETOURNAY:

Pardon, sir?

#### CHAIRMAN:

If we find we are wrong, we may have to come back. Mr. Skoreyko? Oh, please read the order.

### APPEAL CLERK:

This is a hearing of an appeal from a deportation made against Doctor Chung Ming Lu or Henry C. Lu and Mrs. Chung Ming Lu at Edmonton, Alberta, by Special Inquiry Officer J. Wellsman on March 10, 1969.

#### CHAIRMAN:

If you read the second part of Section 10, subsection 1, "... and that Member has and may exercise all of the powers of the Board in relation to the hearing of the appeal." It's pretty broad.

#### MR. BETOURNAY:

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The remarks will be noted, Mr. Betournay, and brought to the attention of the Chairman.

### MR. BETOURNAY:

Thank you. So I am expected to carry on and make the submissions on the behalf of the respondent in this appeal?

#### CHAIRMAN:

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This is a hearing of an appeal from a deportation made against Doctor Chung Ming Lu or Henry C. Lu and Mrs. Chung Ming Lu at Edmonton, Alberta, By Special Inquiry Officer J. Wellsman on March 10, 1969.

(APPEAL CLERK READS THE ORDER)

# (APPEAL CLERK READS THE ORDER)

### CHAIRMAN:

In view of Mr. Betournay's remarks, I think I should produce and file my authority to hold this hearing. Will you please show this to both counsel? This authority will be filed as Exhibit 1 to this hearing. Are you ready to proceed, Mr. Skoreyko?"

Section 10 of the Immigration Appeal Board Act provides:

"10(1) The Chairman of the Board may direct that evidence relating to an appeal under this Act be received, in whole or in part, by a member of the Board and that member has and may exercise all of the powers of the Board in relation to the hearing of the appeal.

(2) A member by whom evidence relating to an appeal under this Act has been received pursuant to subsection (1) shall make a report thereon to the Board and a copy of the report shall be provided to each of the parties to the appeal.

(3) After receiving any report made under subsection (2) and after holding a rehearing, in whole or in part, of the appeal if in its discretion the Board deems it advisable to do so, the Board shall determine the appeal."

It is noted that subsection (1) states "and that member has or may exercise all the powers of the Board in relation to the appeal". These powers include "in relation to the appeal". In an appeal there are usually submissions and arguments of counsel. The Board in its powers can hear such submissions and arguments. It follows that if a properly constructed Board can receive them, a single member can receive them as he "may exercise all the powers of the Board in relation to the bearing of the appeal".

It is significant to note that subsection (2) provides for a report by the member to the Board (a quorum of the Board is the Board) Section 6, subsection (3).

Subsection (3) of Section 10 provides that after the receiving of the report the Board, in its discretion, may without a further hearing "determine the appeal".

It follows that if Parliament had intended a further hearing to be held to receive submissions and arguments of counsel it would have made such a further hearing mandatory. It has not done so. Such submissions and arguments may be received by a single member designated by the Chairman under Section 10 of the Immigration Appeal Board Act, otherwise this section of the Act would be unworkable. It has been held in many cases on the interpretation of statutes that "A statute which is ambiguous must be constructed in such a way as to lead to a logical and reasonable result" C.A. Vol. 33 at page 535.

#### CHAIRMAN:

In view of Mr. Betournay's remarks, I think I should produce and file my authority to hold this hearing. Will you please show this to both counsel? This authority will be filed as Exhibit 1 to this hearing. Are you ready to proceed, Mr. Skoreyko?"

L'article 10 de la Loi sur la Commission d'appel de l'immigration stipule ceci:

"10(1) Le président de la Commission peut ordonner que la preuve relative à un appel prévu par la présente loi soit reçue en totalité ou en partie par un membre de la Commission, et ce membre possède et peut exercer tous les pouvoirs de la Commission relativement à l'audition de l'appel.

(2) Un membre par qui la preuve relative à un appel prévu par la présente loi a été reçue en conformité au paragraphe (1) doit présenter à ce sujet un rapport à la Commission et un exemplaire dudit rapport doit être fourni

à chacune des parties à l'appel.

(3) Après avoir reçu un rapport présenté en vertu du paragraphe (2) et avoir tenu une nouvelle audition totale ou partielle de l'appel, la Commission doit, si elle juge à sa discrétion opportun de le faire, décider de l'appel.

Il est à noter que le paragraphe (1) déclare que "ce membre possède et peut exercer tous les pouvoirs de la Commission relativement à l'audition de l'appel". Au cours d'un appel, les avocats soumettent ordinairement des thèses et des arguments. La Commission a compétence pour entendre ces thèses et ces arguments. Par conséquent, si la Commission régulièrement constituée peut les recevoir, un membre seul peut aussi les recevoir puisqu'il "peut exercer tous les pouvoirs de la Commission relativement à l'audition de l'appel!"

Il est important de noter que le paragraphe (2) prévoit qu'un membre doit soumettre un rapport à la Commission (un quorum de la Commission constituant la Commission, selon l'article 6, paragraphe (3)).

Le paragraphe (3) de l'article 10 prévoit que sur réception du rapport la Commission peut, à sa discrétion, "décider de l'appel".

Il s'ensuit que si le Parlement avait voulu qu'une audition supplémentaire soit tenue pour entendre les soumissions et les arguments des conseillers juridiques, il aurait rendu cette audition supplémentaire obligatoire, ce qu'il n'a pas fait. Ces soumissions et arguments peuvent être reçus par un membre unique nommé par le président selon l'article 10 de la Loi sur la Commission d'appel de l'immigration, sans quoi cet article de la loi ne serait pas applicable. Il a été décidé dans de nombreux cas portant sur l'interprétation des lois que "A statute which is ambiguous must be constructed in such a way as to lead to a logical and reasonable result", C.A., vol. 33, page 535.

The Board applying this canon of interpretation and its reasoning supra is of the opinion that a single member designated by the Chairman under Section 10 of the Immigration Appeal Board Act has the authority to hear an appeal in full under the Immigration Appeal Board Act including submissions and arguments of counsel.

With respect to the Board's discretionary powers under Section 15 the appellants are not permanent residents and as a result the Board's discretion is limited to Section 15(1)(b) of the Immigration Appeal Board Act which provides:

- "15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
  - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
    - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
    - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The evidence contains no indication that the appellants "will be punished for activities of a political character or will suffer unusual hardship".

As to the existence of "compassionate or humanitarian considerations" the female appellant if deported to Taiwan, because of her Japanese origin, will not fit well and may be ostracized in Chinese Society, the male appellant if deported will not be able to use and develop his talents in the field of education as he has been able to do in the United States and Canada. He appears to be an eminent scholar and has a permanent post as Assistant Professor at the University of Calgary. He has had several of his papers published on Educational

La Commission, appliquant cette règle d'interprétation et le raisonnement ci-devant cité, estime qu'un membre unique, nommé par le président selon l'article 10 de la Loi sur la Commission d'appel de l'immigration, a le droit d'entendre un appel en entier, y compris les soumissions et les arguments des conseillers juridiques, en vertu de la Loi sur la Commission d'appel de l'immigration.

Quant aux pouvoirs discrétionnaires attribués à la Commission par l'article 15, les appelants n'étant pas résidants en permanence, la discrétion de la Commission est limitée à l'article 15(1)(b) de la Loi sur la Commission d'appel de l'immigration, qui est rédigé comme suit:

"15(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que

b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'ex-

pulsion, compte tenu

(i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou

(ii) l'existence de motif de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

La preuve n'indique aucunement que les appelants "seront punis pour des activités d'un caractère politique ou soumis à de graves tribulations".

Quant à l'existence de "motifs de pitié ou de considérations d'ordre humanitaire", si l'appelante est expulsée à Taiwan, elle ne réussira pas à s'adapter à la société chinoise et elle pourrait y être ostracisée à cause de son origine japonaise; quant à l'appelant, s'il est expulsé il ne pourra pas mettre à profit et développer ses talents dans le domaine de l'éducation comme il a pu le faire aux Etats-Unis et au Canada. Il semble être un éminent savant et occupe une position permanente à titre de professeur adjoint à l'Université de Calgary. Plusieurs de ses écrits sur la théorie de l'éducation furent publiés et il a traduit en langue anglaise plusieurs volumes de philosophie chinoise afin qu'ils puissent être utilisés à l'Université durant les cours sur l'éducation. Plusieurs lettres de ses employeurs et

Theory and has translated several volumes of Chinese Philosophy to the English language for use in lectures on education in University. Numerous letters from his employers and colleagues were filed attesting to his ability in this field. The appellants also have a son born in Canada in March 1969.

The Board in considering the evidence finds that the appellants have established roots in Canada, that the male appellant as a professor at university has much to offer Canada in the academic field, that the mixed marriage (Japanese and Chinese) would result in social difficulties both in Japan and Taiwan, that the male appellant if deported would not be able to develop and obtain employment commensurate with his academic achievements. Therefore the Board on compassionate and humanitarian grounds directs that the order be stayed for a period of six months and that the Department complete processing of the application for permanent residence (without regard to assessment) and report to the Board the results of such processing.

Dated at Ottawa, this 16th day of December 1969.

Concurred in by: Miss J.V. Scott, Chairman and Gérard Legaré.

For the appellants: Wm. Skoreyko, Esq., M.P.;

For the respondent: P. Bétournay, Barrister and Solicitor.

collègues attestant de ses capacités en cette matière furent déposées en preuve. Les appelants ont de plus, un fils né au Canada en mars 1969.

Considérant la preuve la Commission estime que les appelants ont établi des liens profonds au Canada, que l'appelant masculin a beaucoup à offrir au Canada dans le domaine académique à titre de professeur d'université, que le mariage mixte (japonais et chinois) susciterait des difficultés sociales tant au Japon qu'a Formose, que si l'appellant masculin était expulsé il ne pourrait pas se trouver de l'emploi conforme à ses réalisations académiques. Donc,tant pour des motifs de pitié que des motifshumanitaires, la Commission ordonne de surseoir à l'ordonnance pour une période de six mois et que le Ministère complète l'étude de la demande de résidence permanente (sans considérer l'évaluation) et qu'il soumette un rapport à la Commission à ce sujet.

Fait à Ottawa, le 16e jour de décembre 1969.

Ont souscrit: Mlle J.V. Scott, président et Gérard Legaré.

Pour les appelants: M.Wm. Skoreyko, M.P.; Pour l'intimé: Me P. Bétournay. 25.
Angelina Reyes MARIANO,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 3, 1969; File: 69-459.

Coram: J.C.A. Campbell, Vice-Chairman, U. Benedetti, J.A. Byrne.

Section 23 report - Immigration officer's duty to set out basis of opinion. - SIO's authority to add grounds. - Immigration Act: 11(3), 23; Immigration Regulations: 34(3); Immigration Inquiries Regulations:5.

Held: Campbell, vice-chairman, dissenting: Pursuant to section 5 of the Inquiries Regulations, it is insufficient for an immigration officer to express an opinion in a section 23 report and yet fail to set out the provisions of the Act or Regulations upon which his opinion is founded.

This in no way circumscribes the Special Inquiry Officer's authority pursuant to Section 11(3) of the Immigration Act once a Special Inquiry has been duly initiated to add new grounds to the order as they arise from the evidence adduced at the Inquiry.

The judgment of the Board was delivered by:

## J.A. Byrne:

This is an appeal from a deportation order dated 13 March 1969, made by Special Inquiry Officer L.R. McGrath at the Canadian Immigration Building, Vancouver, B.C. in respect of the appellant Angelina Reyes MARIANO, in the following terms:

- " (i) you are not a Canadian citizen,
  - (ii) you are not a person having Canadian domicile,
  - (iii) you are a member of the prohibited class described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of
    - (a) paragraph (b) of subsection (3) of Section 34 of the Immigration Regulations, Part I in that in the opinion of an Immigration officer you would not, on application be issued an immigrant visa it outside Canada,

Angelina Reyes MARIANO,

appelante,

ν.

Le Ministre de la Main d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 3 novembre 1969; Dossier: 69-459.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Rapport prévu à l'article 23 - devoir du fonctionnaire à l'immigration de définir le fondement de ses opinions. - Il relève de l'autorité de l'enquêteur spécial d'ajouter des motifs. - Loi sur l'immigration: 11(3), 23; Règlement sur l'immigration: 34(3); Règlement sur les enquêtes de l'immigration: 5.

Arrêt: En vertu de l'article 5 du Règlement sur les enquêtes, pour un enquêteur spécial il est insuffisant d'exprimer une opinion dans un rapport prévu à l'article 23, s'il omet de définir les dispositions de la Loi ou du Règlement qui fondent cette opinion.

En vertu de l'article 17(3) de la Loi sur l'immigration l'enquêteur spécial a l'autorité d'ajouter des motifs à l'ordonnance d'expulsion de nouveaux motifs qui proviennent de la preuve apportée à l'enquête. Cette décision en aucune façon ne restreint cette autorité.

Le jugement de la Commission fut rendu par:

# J.A. Byrne:

Appel d'une ordonnance d'expulsion rendue à Vancouver, C.B. dans l'édifice de l'immigration canadienne, par l'enquêteur spécial L.R. McGrath contre l'appelante Angelina Reyes MARIANO. L'ordonnance dit:

- " (i) you are not a Canadian citizen,
  - (ii) you are not a person having Canadian domicile,
  - (iii) you are a member of the prohibited class described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of
    - (a) paragraph (b) of subsection (3) of Section 34 of the Immigration Regulations, Part I in that in the opinion of an Immigration officer you would not, on application be issued an immigrant visa if outside Canada,

(b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection(1) of Section 28 of the Immigration Regulations, Part I.

The appeal was heard September 9, 1969.

The appellant was present to give evidence and was represented by her counsel Dr. D.P. Pandia, Barrister and Solicitor of Vancouver. The Respondent was represented by Mr. P. Betournay.

Mrs. Mariano, age thirty-four, married and a mother of seven children is the holder of the degree Bachelor of Science in Education. While the degree was granted by Laguana College in Pablo City, Philippines, Mrs. Mariano is presently certified by the Department of Education of Victoria, British Columbia, to teach in the public schools of that Province. Her spouse Alefo M. Mariano, age thirty-six, is a graduate in Agriculture from Central Luzon Agricultural School, and Third year College of Bachelor of Science in Education, (not completed).

Since 1953 he has been employed in the Bureau of Plant Industry as a Junior Agronomist with responsibility for the direction of all phases in the experimentation into cereal and vegetable production. In 1966 he was appointed Special Disbursing, Collecting and Property Officer, of Lagalag Experimental Station. He and the seven children residue their own home in the Philippines.

The appellant was married in March 1956 and in the month of July that year began a teaching career which continued without interruption except for the seven pregnancies the last of which was in June 1965. pregnancy pay; the evidence reveals, was made in all cases and throughout her entire married life she was the major contributor to the maintenance of the family unit. For the first several years her husband returned to school and college and following graduation his earnings lagged somewhat behind his wife. Throughout most of her stay in Canada the appellant has been remitting all but her living requirements to her husband and family in the Philippines.

Mrs. Mariano entered Canada at Fort Erie, Ontario, April 8th, 1968. She was travelling on a ticket paid for by an aunt in the United States which ticked provided for continuing passage around the world. She was admitted as a visitor under 7(1)(c) of the Immigration Act for a period which would have expired on October 22, 1968. On the 23rd of April 1968, she applied for permanent residence pursuant to paragraph (3) of Section 34 of the Immigration Regulations, on Immigration form 1008, upon which her signature appears as 'Mrs. Angelina R. Mariano'. This form also disclosed the subject was a female and married. May 29th, 1968, the appellant appeared before Officer Young, at which time Immigration form OS8, complete in every

(b) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer as required by subsection (1) of Section 28 of the Immigration Regulations, Part I.

L'appel a été entendu le 9 septembre 1969.

L'appelante était présente pour porter témoignage et était représentée par Dr. D.P. Pandia, conseiller juridique à Vancouver. M. P. Pandia, conseiller juridique à Vancouver. M. P. Betournay occupait pour l'intimé.

Mme Mariano, trente-quatre ans, mariée et mère de sept enfants détient un baccalauréat en science d'éducation. Tandis que le diplôme lui a été décerné par le Collège Laguana à Pablo City, Philippines, Mmme Mariano est accréditée par le ministère de l'Education de Victoria à enseigner dans les écoles publiques de cette province. Son époux Alefo M. Mariano, âgé de trente-six ans, a reçu un diplôme en agriculture de l'école d'agriculture du Luzon central et est en troisième année d'Ecole normale.

Depuis 1953 il est employé au Bureau of Plant Industry en qualité d'agronome subalterne responsable de la direction de toutes les étapes du programme expérimental sur les denrées céréales et légumineuses. En 1966 il a été nommé payeur et percepteur spécial des propriétés. Il est propriétaire de sa maison et y demeure avec ses enfants.

L'appelante s'est mariée en mars 1956 et cinq mois plus tard elle commencait à enseigner; elle n'a interrompu son enseignement que pendant les périodes de grossesse, la dernière était au mois de juin 1965. Les prestations prénatales ainsi que la preuve montrent que au cours de sa vie maritale elle a contribué pour une large part à la subsistance de sa famille. Pendant les sept premières années son mari est retourné à l'école et à l'université et après l'obtention de son diplôme son salaire était loin d'égaler celui de son épouse. Pendant tout le temps de son séjour au Canada, l'appelante a prélevé sur son salaire ce dont elle avait besoin pour vivre et a envoyé le reste à son mari et à sa famille aux Philippines.

Mme Mariano est entrée au Canada à Fort Erie, Ontario, le 8 avril 1968. Une tante des États-Unis lui avait payé un billet valable pour le tour du monde. Elle a été admise en tant que visiteur selon l'article 7(1)(c) de la Loi sur l'immigration, pour une période qui expirait le 22 octobre 1968. Le 23 avril 1968, elle a fait une demande de résidence permanente conformément à l'alinéa (3) de l'article 34 du Règlement sur l'immigration, demande faite sur la formule de l'Immigration form 1008, sur laquelle apparaît sa signature: Mme Angelina R. Mariano. Cette formule révèle aussi que le sujet était une femme mariée.

detail was examined. In Box 13 of the said form was listed the name of her spouse, his birth date and address as well as those details of her seven children. A medical certificate serial #14335 was issued on the same date by a Medical Officer of the Department.

While Mrs. Mariano was initially examined on May 29, 1968, by Officer Young, the Section 23 report dated September 6, 1968, which initiated the Inquiry, was signed by Officer MacDonald.

The Section 23 report was issued following a paper screening of Mr. Mariano by a Visa Officer in Manila who declared him inadmissible. The evidence is not too clear as to why he was being processed as an independent applicant since his name already appeared on the application of his wife here in Canada.

The validity of the order was attacked by Dr. Pandia on the following grounds:

- (a) That Section 34(3)(b) of the Immigration Regulations, Part I, is procedural and cannot be used as a ground for deportation.
- (b) That the deportation order must state exactly the provision of the Act or Regulation which is the reason for deportation (Section 12 of the Immigration Inquiries Regulations). This order does not and is therefore not in accordance with the law.
- (c) That the officer who wrote the Section 23 report is not the officer who examined the applicant for permanent residence, that is, the officer who assessed her is not in fact the person who signed the report therefore the Section 23 report is void and the deportation order based on the Section 23 report is also null and void.
- (d) She was an independent applicant and was accepted as such. Once her application is accepted her immediate family are also admissible -- reference to the definition of immediate family in the Immigration Regulations, Part I, Section 2(ca). Dr. Pandia referred also to the appellant was not treated with equality because of her sex, that is, because she is a woman it does not follow that she cannot be head of the family.
- "(a) That Section 34(3)(b) of the Immigration Regulations,
  Part I, is procedural and cannot be used as a ground
  for deportation."

There is no consensus in respect of this matter, Jag Diswar Singh v Minister, #69-639, i.e., is the absence of a visa, without more, in respect of section 34 an applicant in Canada a valid reason for a

Le 29 mai 1968 l'appelante est comparue devant l'agent Young; à cette occasion la formule de l'immigration OS8, dûment remplie a été examinée. Le nom de son mari, sa date lieu de naissance et son adresse ainsi que des renseignements au sujet de ses sept enfants ont été inscrits dans la case l3 de ladite formule. À la même date, un certificat médical portant le numéro de série #14335 a été délivré par un médecin du ministère.

Bien que Mme Mariano ait été examinée la première fois le 29 mai 1968 par l'agent Young, le rapport prévu par l'article 23 daté du 6 septembre 1968, rapport qui a déclenché l'enquête, était signé par l'agent MacDonald.

Le rapport prévu par l'article 23 a été délivré après un examen minutieux des papiers de M. Mariano, par un préposé aux visas à Manille qui l'a déclaré inadmissible. La preuve ne répond pas complètement à la question suivante: pourquoi a-t-il été classé en tant que requérant indépendant puisque son nom était déjà apparu sur la demande faite par sa femme au Canada?

Dr. Pandia a mis en doute la validité de l'ordonnance d'expulsion pour les motifs suivants:

- (a) L'article 34(3)(b) du Règlement sur l'immigration Partie I, relève de la procédure et ne peut pas être utilisé comme motif d'expulsion.
- (b) L'ordonnance d'expulsion doit indiquer les dispositions de la Loi ou du Règlement en raison desquelles est émise l'ordonnance (article 12 du Règlement sur les enquêtes de l'immigration). Cette ordonnance ne les indiquant pas n'est pas en conformité avec la loi.
- (c) Le fonctionnaire auteur du rapport prévu à l'article 23 n'est pas celui qui a examiné la requérante d'une résidence permanente; en effet l'agent qui l'a appréciée n'est pas en fait la personne signataire du rapport; en conséquence le rapport prévu à l'article 23 est nul et l'ordonnance d'expulsion fondée sur ce rapport est aussi nulle et non avenue.
- (d) Elle était une requérante indépendante et a été acceptée en tant que telle. Dès que sa demande est accordée les membres de sa famille immédiate sont admissibles -- la définition de famille immédiate est donnée par le Règlement sur l'immigration, Partie I, article 2(ca). Dr. Pandia mentionne aussi la Déclaration des droits canadiens, à l'effet que, l'appelante n'a pas été traitée avec égalité à cause de son sexe; c'est-à-dire, parce qu'elle est une femme il ne s'ensuit pas qu'elle ne peut être chef de famille.

deportation order? The Board therefore is not prepared, in the instant case, to rule on this question and, for reasons which will become obvious, finds it unnecessary to do so.

"(b) That the deportation order must state exactly the provision of the Act or Regulation which is the reason for deportation (Section 12 of the Immigration Inquiries Regulations). This order does not and is therefore not in accordance with the law."

Section 12 of the Immigration Inquiries Regulations reads as follows:

"A presiding officer who makes a deportation order in respect of a person shall forthwith upon making such order

(a) inform the person as to the provisions of the Act or the Immigration Regulations pursuant to which the order was made."

This deportation order, which the Board may presume, in the absence of any other official document, is the required information to the person, does not comply with such an injunction. If the Board accepts argument of counsel for the respondent that an applicant pursuant to Section 34(3)(b) of the Regulations may be deported under Section 28(1) alone, then it becomes of paramount importance that the Special Inquiry Officer quote that section of the Regulations by reason of which, in his opinion, the appellant would not be granted a visa unon application outside Canada. In the instant case, 34(3)(a) which states "Notwithstanding Section 28, an applicant in Canada who (a) if outside Canada would be an independent applicant;" is the operative section of the Regulations, not 34(3)(b) which, in the case of an applicant in Canada, Is merely a synonym for Section 28(1). Section 34(3)(a), therefore, should have been referred to in the order.

Mr. Betournay, in argument  $\underline{\text{Page 39}}$  of the transcript of the hearing said:

"This brings me to what appears to be the issue in this case, whether the admission of the family depends strictly on the husband's application. On considering this case, and again at noon, I have come to the conclusion I must submit that strictly speaking the deportation order is valid on a fairly technical ground. In other words only one ground of substance. I am not referring to the first two grounds. It is not challenged that she is not a Canadian citizen and is a person who has not acquired Canadian domicile. I am referring to the one ground of substance, that is the reference

"(a) That section 34(3)(b) of the Immigration Regulations, Part I, is procedural and cannot be used as a ground for deportation."

En cette matière il n'y a pas unanimité; dans la cause Jag Diswar Singh c. ministre, #69-639, i.e., l'absence de visa, sans plus, est-elle une raison valide pour émettre une ordonnance d'expulsion, selon l'article 34, contre un requérant au Canada? La Commission n'est donc pas à même, dans cette instance, de trancher cette question, et pour des raisons qui deviendront évidentes, déclare qu'il n'est pas nécessaire de le faire.

"(b) That the deportation order must state exactly the provision of the Act or Regulation which is the reason for deportation (Section 12 of the Immigration Inquiries Regulations). This order does not and is therefore in accordance with the law."

L'article 12 du Règlement sur les enquêtes de l'immigration dit:

'Un président d'enquête qui rend une ordonnance d'expulsion contre une personne doit immédiatement, en ce faisant,

(a) mettre la personne au courant des dispositions de la Loi ou du Règlement sur l'immigration en vertu desquelles l'ordonnance a été rendue."

La Commission peut présumer que étant donné l'absence de tout autre document officiel, l'ordonnance d'expulsion est l'information prescrite donnée à la personne, ainsi l'ordonnance ne satisfait pas à l'injonction de l'article. Si la Commission accepte l'argument du conseiller de l'intimé, à savoir qu'un requérant en vertu de l'article 34(3)(b) du Règlement peut être expulsé selon l'article 28(1), en tant que tel, en conséquence il est primordial que l'enquêteur spécial cite l'article du Règlement en raison duquel il estime qu'on refuserait un visa à l'appelant si la demande était faite fors du Canada. Dans l'instance, l'article 34(3)(a) stipule "Nonobstant les dispositions de l'article 28, un requérant se trouvant au Canada qui (a) s'il se trouvait hors du Canada serait un requérant indépendant," est l'article essentiel du Règlement, quand à l'article 34(3)(b) dans le cas d'un requérant se trouvant au Canada, équivaut simplement à l'article 28(1). L'article 34(3)(a), donc, aurait dû être invoqué dans cette ordonnance.

 $\,$  M. Betournay, dans son argumentation, page 39 de 1a transcription de 1'audition, a dit:

"This brings me to what appears to be the issue in this case, whether the admission of the family depends strictly on the husband's application. On to failure to comply with the provisions of Section 28(1), In other words I am not relying on the other grounds simply because in the words of paragraph (a) of section (3) of Regulation 34 if outside Canada Mrs. Mariano would not be an independent applicant. I suggest the other ground based on 34(3)(b) is superfluous. The new Regulation has no application in the case of this appeal. I submit this is what the special inquiry officer in effect put in his deportation order, but he should perhaps not have referred to the "other ground." (The emphasis is mine.)

In effect, Mr. Betournay is saying here that Mrs. Mariano has no right pursuant to "the new regulations" Section 34(3)(b) to make an application in Canada. That being so, surely she is entitled to be informed which section of the "old" regulations by the terms of which she is prohibited, or alternatively the relevant section of the "new" regulations which might conceivably apply;

- "32 (1) An independent applicant and his immediate family may be granted admission to Canada for permanent residence if
  - (a) he and his immediate family comply with the requirements of the Act and these Regulations:"

While taking due notice of what appears to be a disregard for a section of the Immigration Regulations, the Board declines, for obvious reasons, to rule on this matter.

"(c) That the officer who wrote the Section 23 report is not the officer who examined the applicant for permanent residence, that is, the officer who assessed her is not in fact the person who signed the report therefore the Section 23 report is void and the deportation order based on the Section 23 report is also null and void."

The evidence before the Board shows a conflict regarding the person who originated the Section 23 report. It is true the examination was made by Officer Young but the information which came to hand subsequently, if relevant, was sufficient, in the circumstances, to instate a Section 23 report by any other officer and the Board is of the upinion that had all other references in the report been in order, the Special Inquiry Officer would not have been without jurisdiction. However, the Board does conclude that the Section 23 report signed by Officer MacDonald did not comply in sufficient detail with Section 5 of the Immigration Inquiries Regulations:

considering this case, and again at noon, I have come to the conclusion I must submit that strictly speaking the deportation order is valid on a fairly technical ground. In other words only one ground of substance. I am not referring to the first two grounds. It is not challenged that she is not a Canadian citizen and is a person who has not acquired Canadian domicile. I am referring to the one ground of substance, that is the reference to failure to comply with the provisions of Section 28(1). In other words I am not relying on the other grounds simply because in the words of paragraph (a) of section (3) of Regulation 34 if outside Canada Mrs. Mariano would not be an independent applicant. I suggest the other ground based on 34(3)(b)is superfluous. The new Regulation has no application in the case of this appeal. I submit this is what the special inquiry officer in effect put in his deportation order, but he should perhaps not have referred to the "other ground." (nos soulignés).

En effet, M. Betournay dit ici que Mme Mariano se trouvant au Canada n'a pas le droit de faire une demande selon l'article 34(3)(b) du "nouveau règlement". Étant donné ceci, elle est en droit d'être mise au courant soit de l'article de l'"ancien" règlement au terme duquel elle est placée dans la catégorie interdite, soit de l'article pertinent du "nouveau" règlement qui pourrait s'appliquer.

- "32(1) L'admission au Canada en vue d'y résider en permanence peut être accordée à un requérant indépendant et aux membres de sa famille immédiate,
  - (a) si lui-même et les membres de sa famille immédiate satisfont aux exigences de la Loi et du présent Règlement:"

Tandis que la Commission prend bonne note de ce qui apparaît être une inobservation d'un article du Règlement sur l'immigration, elle refuse de trancher en cette matière pour des raisons évidentes.

"(c) That the officer who wrote the Section 23 report is not the officer who examined the applicant for permanent residence, that is, the officer who assessed her is not in fact the person who signed the report therefore the Section 23 report is void and the deportation order based on the Section 23 report is also null and void."

La preuve devant la Commission montre qu'il y a doute quant à la personne à l'origine du rapport prévu par l'article 23. Il est vrai que l'agent Young a examiné l'appelante, mais si les renseignements tirés de

Where an immigration officer has caused a person seeking to come into Canada to be detained and has reported him to a Special Inquiry Officer pursuant to Section 23 of the Act, the report so made shall be in writing and shall set out the provisions of the Act or the Immigration Regulations by reason of which the immigration officer is of the opinion that the person should not be granted admission or allowed to come into Canada.

Pursuant to this section of the Inquiries Regulations, it is insufficient for an immigration officer to express an opinion yet fail to set out the provisions of the Act or Regulation upon which his opinion is founded. The Board finds the Section 23 report which initiated the Special Inquiry, is meaningless, incomplete and not in accordance with Section 5 of the Inquiries Regulations and therefore effectively vitiates the Inquiry.

While it may be consistent with the Regulations for a Visa Officer located in a foreign country to summarily dismiss an application by affixing his signature to a form letter as was done in the case of Mr. Mariano, Exhibit "E" of the Inquiry, which states in part "After assessing all factors relative to your admissibility, it is felt that you would be unlikely to establish yourself in Canada", it must be understood that Mrs. Mariano is an applicant in Canada and subject to the benefits of the Immigration Act, and Regulations pursuant to the Act, as they apply here in Canada. This is neither to commend nor derogate the law but merely a statement of what the Board believes to be the correct interpretation of the Statutes as they are constituted. The Board, bearing in mind a recent decision of the Supreme Court of Canada, June 2, 1969, Smaro MOSHOS and Minor Children v the Minister of Manpower and Immigration, which appears to demand substantial compliance with the Immigration Inquiries Regulations by the Special Inquiry Officer, is prepared to allow the appeal. The Board finds that the Special Inquiry Officer, on the basis of an imcomplete, and indeed meaningless Section 23 report, proceeded to hold an Inquiry.

The Board wishes to emphasize this decision in no way circumscribes the authority of the Special Inquiry Officer provided pursuant to Section 11(3) of the Immigration Act once a Special Inquiry has been duly initiated in accordance with the Inquiries Regulations and under which section the said officer has the undoubted right to add new grounds to the order of deportation as they arise from the evidence adduced at the Inquiry.

The Board wishes to note further, Section 24(2) of the Immigration Act:

'Where the Special Inquiry Officer receives a report under Section 23 concerning a person, other than a l'examen sont pertinents, ils suffisent selon les circonstances à faire déclencher un rapport prévu par l'article 23 par n'importe quel autre agent, la Commission estime que si tous les autres motifs de l'ordonnance étaient valides, l'enquêteur spécial n'aurait pas perdu sa compétence. Toutefois, la Commission conclut que le rapport prévu par l'article 23 signé par le fonctionnaire à l'immigration MacDonald ne satisfait pas suffisamment aux exigences de l'article 5 du Règlement sur les enquêtes de l'immigration:

"Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada ni autorisée à y venir."

Conformément à cet article du Règlement sur les enquêtes l'expression de l'opinion de l'enquêteur spécial dans un rapport prévu à l'article 23 est insuffisante s'il omet de définir les dispositions de la Loi et du Règlement qui la fonde. La Commission déclare que le rapport prévu par l'article 23, qui déclenche l'enquête, est démué de sens, incomplet et n'est pas en conformité avec l'article 5 du Règlement sur les enquêtes et en conséquence rend l'enquête nulle.

Dans le cas de M. Mariano, bien qu'un préposé aux visas situé dans un pays étranger agisse peut être en conformité avec le réglement quand il rejette sommairement une demande en apposant sa signature sur une lettre type (preuve à l'appui "E" de l'enquête) qui déclare en partie: "After assessing all factors relative to your admissibility, it is felt that you would be unlikely to establish yourself in Canada", il doit être retenu que Mme Mariano est une requérante au Canada et donc sujette aux privilèges accordés par la Loi sur l'immigration, et le Règlement selon la Loi, comme ils s'appliquent ici au Canada. Ceci n'est ni une recommandation ni une dérogation à la Loi mais simplement une déclaration sur ce que la Commission estime être l'interprétation exacte des statuts tels qu'ils sont constitués. La Commission est prête à accueillir l'appel car elle garde en mémoire une décision récente de la Cour suprême du Canada rendue le 2 juin 1969 dans l'affaire Smaro MOSHOS et enfants mineurs c. le Ministre de la Main-d'oeuvre et de l'immigration où il apparaît que l'on demande à l'enquêteur spécial d'être en réelle conformité avec le Règlement sur les enquêtes de l'immigration. La Commission déclare donc que l'enquêteur spécial en s'appuyant sur un rapport prévu par l'article 23, incomplet et dénué de sens, a procédé à la tenue d'une enquête.

L'enquêteur spécial est investi de son autorité par l'article 11(3) de la Loi sur l'immigration, et cette décision en aucune façon restreint cette autorité; dès que l'enquête spéciale a été dûment

person referred to in subsection (1), he shall admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry under this Act."

This section appears to grant some powers of discretion to a Special Inquiry Officer as to whether a person be allowed to remain or an Inquiry held and any such decision must necessarily be influenced by the details of the Section 23 report.

"(d) She was an independent applicant and was accepted as such. Once her application is accepted her immediate family are also admissible -- reference to the definition of immediate family in the Immigration Regulations, Part I, Section 2(ca). Dr. Pandia referred also to the Canadian Bill of Rights to the effect that the appellant was not treated with equality because of her sex, that is, because she is a woman it does not follow that she cannot be head of the family."

The Board has taken due notice of Dr. Pandia's argument,including reference to the Bill of Rights, and of all the evidence in respect of the determination as to who is the head of the family as defined in the interpretation section of the Immigration Act: (h) "head of family" means the person in the family upon whom the other members of the family are mainly dependent for support. Also in relation to the instant case, the Board has duly noted the definition of "immediate family" as contained in the Immigration Regulations, Part I, Section 2(ca): "immediate family" in relation to any person means the husband or wife of that person....."

However, since the appeal is allowed on other grounds, the Board in the instant case is not prepared nor is it deemed necessary to rule on this matter.

The Board, having devoted many hours perusing the lengthy evidence with a supporting exhibits and in pursuing the many possible ramifications. Thus itself inclined to agree and to commiserate with Mr. Betournay when to observed in argument before the Board, "I don't know how to assess the case at this point, but I have found it to be a mind-bogging (sic) experience to try and find out what happened in this case".

Dated at Ottawa, this 5th day of December, 1969.

Concurred in by: U. Benedetti.

J.C.A. Campbell, Vice-chairman, dissenting:

A majority of the Board has allowed this appeal on the ground that the Section 23 report which initiated the Inquiry was "meaningless, incomplete and not in accordance with Section 5 of the Immigration Inquiries Regulations and it therefore effectively vitiated the inquiry." l'examen sont pertinents, ils suffisent seion les circonstances à faire déclencher un rapport prévu par l'article 2% par n'importe quel autre agent, la Commission estime que si tous les autres motifs de l'ordonnance étaient valides, l'enquêteur spécial n'aurait pas perdu sa compétence. Toutefois, la Commission conclut que le rapport prévu par l'article 23 signé par le fonctionnaire à l'immigration MacDonald ne satisfait pas suffisamment aux exigences de l'article 5 du Règlement sur les enquêtes de l'immigration:

"Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raison desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada ni autorisée à y venir."

Conformément à cet article du Règlement sur les enquêtes l'expression de l'opinion de l'enquêteur spécial dans un rapport prévu à l'article 23 est insuffisante s'il omet de définir les dispositions de la Loi et du Règlement qui la fonde. La Commission déclare que le rapport prévu par l'article 23, qui déclenche l'enquête, est dénué de sens, incomplet et n'est pas en conformité avec l'article 5 du Règlement sur les enquêtes et en conséquence rend l'enquête nulle.

Dans le cas de M. Mariano, bien qu'un préposé aux visas situé dans un pays étranger agisse peut être en conformité avec le reglement quand il rejette sommairement une demande en apposant sa signature sur une lettre type (preuve à l'appui "E" de l'enquête) qui déclare en partie; "After assessing all factors relative to your admissibility, it is felt that you would be unlikely to establish yourself in Canada", il doit être retenu que Mme Mariano est une requérante au Canada et donc sujette aux privilèges accordés par la Loi sur l'immigration, et le Règlement selon la Loi, comme ils s'appliquent ici au Canada. Ceci n'est ni une recommandation ni une dérogation à la Loi mais simplement une déclavation sur ce que la Commission estime être l'interprétation exacte des statuts tels qu'ils sont constitués. La Commission est prête à accueillir l'appel car elle garde en mémoire une décision récente de la Cour suprême du Canada rendue le 2 juin 1969 dans l'affaire Smaro MOSHOS et enfants mineurs c. le Ministre de la Main-d'oeuvre et de l'immigration où il apparaît que l'on demande à l'enquêteur spécial d'être en réelle conformité avec le Règlement sur les enquêtes de l'immigration. La Commission déclare donc que l'enquêteur spécial en s'appuyant sur un rapport prévu par l'article 23, incomplet et dénué de sens, a procédé à la tenue d'une enquête.

L'enquêteur spécial est investi de son autorité par l'article 11(3) de la Loi sur l'immigration, et cette décision en aucune façon restreint cette autorité; dès que l'enquête spéciale a été dûment

person referred to in subsection (1), he shall admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry under this Act."

This section appears to grant some powers of discretion to a Special Inquiry Officer as to whether a person be allowed to remain or an Inquiry held and any such decision must necessarily be influenced by the details of the Section 23 report.

"(d) She was an independent applicant and was accepted as such. Once her application is accepted her immediate family are also admissible -- reference to the definition of immediate family in the Immigration Regulations, Part I, Section 2(ca). Dr. Pandia referred also to the Canadian Bill of Rights to the effect that the appellant was not treated with equality because of her sex, that is, because she is a woman it does not follow that she cannot be head of the family."

The Board has taken due notice of Dr. Pandia's argument, including reference to the Bill of Rights, and of all the evidence in respect of the determination as to who is the head of the family as defined in the interpretation section of the Immigration Act: (h) "head of family" means the person in the family upon whom the other members of the family are mainly dependent for support. Also in relation to the instant case, the Board has duly noted the definition of "immediate family" as contained in the Immigration Regulations, Part I, Section 2(ca): "immediate family" in relation to any person means the husband or wife of that person....."

However, since the appeal is allowed on other grounds, the Board in the instant case is not prepared nor is it deemed necessary to rule on this matter.

The Board, having devoted many hours perusing the lengthy evidence with its supporting exhibits and in pursuing the many possible ramifications, finds itself inclined to agree and to commiserate with Mr. Betournay when he observed in argument before the Board, "I don't know how to assess the case at this point, but I have found it to be a mind-bogging (sic) experience to try and find out what happened in this case".

Dated at Ottawa, this 5th day of December, 1969.

Concurred in by: U. Benedetti.

J.C.A. Campbell, Vice-chairman, dissenting:

A majority of the Board has allowed this appeal on the ground that the Section 23 report which initiated the Inquiry was "meaningless, incomplete and not in accordance with Section 5 of the Immigration Inquiries Regulations and it therefore effectively vitiated the inquiry."

déclenchée conformément au Règlement sur les enquêtes et selon cet article, ledit fonctionnaire a le droit incontestable d'ajouter à l'ordonnance d'expulsion de nouveaux motifs qui proviennent de la preuve apportée à l'enquête.

Par ailleurs, la Commission désire remarquer que l'article 24(2) de la Loi sur l'immigration dit:

"Lorsque l'enquêteur spécial reçoit un rapport prévu à l'article 23 sur une personne autre qu'une personne mentionnée au paragraphe (1), <u>il doit l'admettre ou la laisser entrer au Canada, ou</u> il peut la faire détenir en vue d'une <u>enquête immédiate sous le régime de la présente Loi."</u>

Il apparaît que cet article accorde quelques pouvoirs discrétionnaires à l'enquêteur spécial qui les utilise pour déterminer si la personne doit être autorisé à rester ou s'il doit tenir une enquête et les renseignements contenus dans le rapport prévu à l'article 23 influent sur n'importe laquelle de ces décisions

"(d) She was an independent applicant and was accepted as such. Once her application is accepted her immediate family are also admissible -- reference to the definition of immediate family in the Immigration Regulations, Part I, Section 2(ca). Dr. Pandia referred also to the Canadian Bill of Rights to the effect that the appellant was not treated with equality because of her sex, that is, because she is a woman it does not follow that she cannot be head of the family."

La Commission a pris en considération l'argument du Dr. Pandia, lequel s'appuie sur la Déclaration des droits canadiens et sur la preuve dans son ensemble, pour déterminer qui est le chef de famille tel que le définit l'article (h) de l'interprétation de la Loi sur l'immigration: "chef de famille" signifie la personne de la famille de qui les autres membres dépendent principalement pour leur soutien. Aussi, en rapport avec l'instance, la Commission a dûment noté la définition de "famille immédiate" telle que contenue dans le Règlement sur l'immigration, Partie I, article 2(ca); "famille immédiate" par rapport à toute personne, signifie l'époux ou l'épouse de cette personne...."

Toutefois, puisque l'appel est accueilli pour d'autres motifs, la Commission dans cette instance n'est ni disposée ni n'estime nécessaire de décider en cette matière.

La Commission, après avoir consacré de nombreuses heures à prendre connaissance de la longue preuve avec ses pièces à l'appui et à suivre les nombreuses ramifications possibles, déclare être disposée à être d'accord et à compatir avec M. Betournay lorsque celui-ci a observé dans son argumentation devant la Commission, "I don't know how to assess the case at this point, but I have found it to be a mind-bogging (sic) experience to try and find out what happened in this case".

Ottawa, le 5 décembre 1969. A souscrit: U. Benedetti. The said Section 5 is as follows:

"5. Where an immigration officer has caused a person seeking to come into Canada to be detained and has reported him to a Special Inquiry Officer pursuant to section 23 of the Act, the report so made shall be in writing and shall set out the provisions of the Act or the Immigration Regulations by reason of which the immigration officer is of the opinion that the person should not be granted admission or allowed to come into Canada."

In the appeal of Wai Hung Ho, 69-278 (unreported) the Section 23 report and the deportation order were in almost the same words as in the instant appeal except for the inclusion of an additional ground (lack of a medical certificate). In a majority decision the Ho appeal was allowed, Board Member J-P. Houle dissenting. The Board in its written reasons stated "the Board finds that in this particular appeal the said Report failed to comply with the requirements of the Immigration Inquiries Regulations. As the Section 23 Report was not made in accordance with the law it is a nullity. Subsequently, all the Inquiry proceedings held as a result of the said Section 23 Report are also a nullity."

In his dissenting judgment Board Member J.-P. Houle dealt exhaustively with the form and content required in a Section 23 report. I am in agreement with the conclusion reached by Board Member Houle in the Ho appeal in respect of the Section 23 report and applying it to the instant appeal it is my opinion that this Section 23 report fulfils all the pertinent provisions related to it and therefore the Inquiry is not vitiated.

At the commencement of Mrs. Mariano's Inquiry the Special Inquiry Officer having read the Section report to her and in the presence of her counsel asked her the following question "you heard me read this Report under Section 23 of the Immigration Act Mrs. Mariano and I would ask you to look at it and tell me, are you the person referred to in this Report?" Mrs. Mariano replied "Yes" (Inquiry, page 2). The Special Inquiry Officer did not give Mrs. Mariano or her counsel any explanation at all why Immigration Regulation 34(3)(b) constituted a bar to her being issued an immigrant visa if she had applied for such visa outside Canada. In other words she was not informed with reasonable certainty the case she was required to meet.

At the conclusion of the Inquiry the Special Inquiry Officer in his decision and subsequently in the deportation order used the following language in respect of the use of Section 34(3)(b) of the Immigration Regulations, Part I:

## Dissident J.C.A. Campbell, vice-président:

La Commission, à la majorité, a accueilli cet appel car selon elle, le rapport prévu à l'article 23 qui a déclenché l'enquête était "meaningless, incomplete and not in accordance with Section 5 of the Immigration Inquiries Regulations and it therefore effectively vitiated the inquiry."

#### L'article 5 dit:

"5. Lorsqu'un fonctionnaire à l'immigration a fait détenir une personne qui cherchait à entrer au Canada et qu'il a signalé cette personne à un enquêteur spécial, conformément à l'article 23 de la Loi, le rapport à cet effet doit être fourni par écrit et il doit indiquer les dispositions de la Loi et du Règlement sur l'immigration en raisons desquelles ce fonctionnaire à l'immigration estime que la personne ne doit pas être admise au Canada ni autorisée à y venir."

Dans l'appel de Wai Hung Ho; 69-278 (non rapporté) le rapport prévu à l'article 23 et l'ordonnance d'expulsion étaient exprimés presque dans les mêmes termes que ceux de cette instance excepté pour l'introduction d'un motif additionnel à l'ordonnance (défaut de certificat médical). Une décision majoritaire a accueilli l'appel de M. Ho, toutefois J.-P. Houle membre de la Commission était dissident. Dans son rapport la Commission déclare "the Board finds that in this particular appeal the said Report failed to comply with the requirements of the Immigration Inquiries Regulations. As the Section 23 Report was not made in accordance with the law it is a nullity. Subsequently, all the Inquiry proceedings held as a result of the said Section 23 Report are also a nullity."

Dans son jugement dissident J.-P. Houle membre de la Commission, traite d'une manière exhaustive de la forme et du contenu prescrits pour un rapport prévu à l'article 23. J'approuve la conclusion de M. Houle relative du rapport prévu à l'article 23 dans l'appel de M. Ho. J'estime que cette conclusion est valable dans cette instance, donc ce rapport prévu à l'article 23 satisfait toutes les dispositions pertinentes qui le concernent et en conséquence l'enquête n'est pas altérée.

Au début de l'enquête de Mme Mariano l'enquêteur spécial après avoir lu le rapport prévu à l'article 23 à Mme Mariano assistée de son conseiller, lui a posé la question suivante: "you heard me read this Report under Section 23 of the Immigration Act Mrs. Mariano and I would ask you to look at it and tell me, are you the person referred to in this Report?" Mme Mariano a répondu "Yes" (page 2 de l'enquête). L'enquêteur spécial n'a expliqué, ni à Mme mariano ni à son conseiller pourquoi l'article 34(3)(b) du Règlement sur l'immigration constiuait un obstacle à la délivrance de son visa d'immigrant si elle avait

"iii) you are a member of the prohibited class described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of

(a) paragraph (b) of subsection (3) of Section 34 of the Immigration Regulations, Part I in that in the opinion of an Immigration officer you would not, on application be issued an immigrant visa if

outside Canada."

In the appeal of De Sousa and The Minister of Manpower and Immigration; 68-6096 (unreported) the Deportation Order read, inter alia,

- "(3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) paragraph (b) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended, in that, you would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside of Canada, you would have been refused admission pursuant to paragraph (a) of subsection (1) of section 32 of the Immigration Regulations, Part 1, amended because the head of the family of which you are a member does not comply with the requirements of these Regulations. That is, your husband Francisco Maria Sousa, an independent applicant, residing in Azores, Portugal, has been assessed in accordance with the norms for assessment of independent applicants set out in Schedule A of the Immigration Regulations and has not achieved the units of assessment required by independent applicants outside Canada, pursuant to paragraph (3) of Schedule A of the Immigration Regulations."

In De Sousa the appellant was clearly and explicitly informed of the grounds on which the deportation order was based. This cannot be said to be the case in the instant appeal and in my opinion that portion of the deportation order referring to Section 34(3)(b) of the Immigration Regulations, Part I is invalid for lack of particulars.

There remains for consideration the other ground set out in the Deportation Order, namely, the fact Mrs. Mariano was admittedly (page 12, Inquiry) not in possession of a valid and subsisting immigrant visa as required by Section 28(1) of the Immigration Regulations, Part I which reads:

demandé un tel visa hors du Canada. En d'autres termes, elle n'a pas été mise au courant, avec une certitude raisonnable des exigences auxquelles elle devait satisfaire.

Au terme de l'enquête, l'enquêteur dans sa décision et subséquemment dans l'ordonnance d'expulsion, a pris en référence l'article 34(3)(b) du Règlement sur l'immigration, Partie I, et a déclaré:

"iii) you are a member of the prohibited class described in paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the conditions and requirements of the Immigration Regulations, Part I, by reason of

(a) paragraph (b) of subsection (3) of Section 34 of the Immigration Regulations, Part I in that in the opinion of an Immigration officer you would not, on application be issued an immigrant visa if outside Canada."

Dans l'appel de De Sousa et le ministre de la Main-d'œuvre et de l'Immigration; 68-6096 (non rapporté) l'ordonnance d'expulsion dit notamment:

- "(3) you are a member of the prohibited class described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations by reason of:
  - (a) paragraph (b) of subsection (3) of section 34 of the Immigration Regulations, Part I, amended, in that, you would not on application be issued a visa or letter of pre-examination if outside Canada for, if examined outside of Canada, you would have been refused admission pursuant to paragraph (a) of subsection (1) of section 32 of the Immigration Regulations, Part I, amended because the head of the family of which you are a member does not comply with the requirements of these Regulations. That is, your husband Francisco Maria Sousa, an independent applicant, residing in Azores, Portugal, has been assessed in accordance with the norms for assessment of independent applicants set out in Schedule A of the Immigration Regulations and has not achieved the units of assessment required by independent applicants outside Canada, pursuant to paragraph (3) of Schedule A of the Immigration Regulations."

Dans l'affaire De Sousa, l'appelant a été mis au courant d'une manière claire et explicite des motifs fondant l'ordonnance d'expulsion. On ne peut en dire autant pour cette instance, et j'estime que le manque de précisions rend invalide la partie de l'ordonnance d'expulsion relative à l'article 34(3)(b) du Règlement sur l'immigration.

"28(1) Every immigrant who seeks to land in Canada shall be in possession of a valid and subsisting immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by the officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted landing in Canada."

As a deportation order is severable one valid ground is sufficient to uphold such order. Is the use of Section 28(1) of the Immigration Regulations, Part I a valid ground on which to order the deportation of Mrs. Mariano?

It is apparent from the evidence before the Board that Mrs. Mariano's application was processed by the Immigration authorities and that she passed her medical examination. However her husband, according to the uncontradicted evidence, did not meet the immigration requirements (Exhibit "E" Inquiry). By Section 32(1)(a) of the Immigration Regulations, Part I he is required to meet such requirements as a member of the immediate family. Immediate family is defined by Section 2(ca) of the Immigration Regulations as follows:

"2(ca) "immediate family" in relation to any person means the husband or wife of that person and any unmarried son or daughter of that person under the age of twenty-one years."

It is clear from the evidence that one member of Mrs. Mariano's family, her husband cannot comply with the Immigration requirements. She would not therefore be issued an immigrant visa if she had applied outside Canada. Although she applied in Canada (as she was entitled to do) the waiver provision in respect of Section 28(1) referred to in Immigration Regulation 34(3) does not apply. She is required to be in possession of a valid and subsisting immigrant visa which she does not have.

In my opinion Section 28(1) of the Immigration Regulations, Part I is a valid ground on which to order her deportation.

I would dismiss the appeal.

Dated at Ottawa, this 16th day of December 1969.

For the appellant: Dr. D.P. Pandia, Barrister and Solicitor; For the respondent: P. Betournay, Barrister and Solicitor.

A présent il reste à considérer l'autre motif défini par l'ordonnance d'expulsion, à savoir: le fait reconnu que Mme Mariano (page 12 de l'enquête) n'était pas en possession d'un visa d'immigrant valable et non périmé ainsi que le prescrit l'article 28(1) du Règlement sur l'immigration, Partie I qui dit:

"28(1) Tout immigrant qui cherche à être reçu au Canada devra être en possession d'un visa d'immigrant valable et non périmé qui lui aura été délivré par un préposé aux visas et portant un numéro de série qui a été inscrit par le préposé aux visas dans un registre prescrit par le Ministre à cette fin, et, à moins qu'il ne soit en possession d'un tel visa, on ne lui accordera pas la reception au Canada."

Le contenu de l'ordonnance d'expulsion étant détachable, un motif suffit à valider celle-ci. Les dispositions de l'article 28(1) du Règlement sur l'immigration Partie I, constituent-elles un motif valide pour expulser Mme Mariano?

La preuve devant la Commission montre que les autorités de l'immigration ont étudié la demande de Mme Mariano, et elle a subi un examen médical. Par contre, selon la preuve incontestée, son mari n'a pas satisfait aux exigences de l'immigration (preuve à l'appui "E" à l'enquête). L'article 32(1)(a) du Règlement sur l'immigration, Partie I lui demande de satisfaire à de telles prescriptions en tant que membre de la famille immédiate. L'article 2(ca) du Règlement sur l'immigration définit famille immédiate ainsi:

"2(ca) "famille immédiate" par rapport à toute personne signifie l'époux ou l'épouse de cette personne et tout fils ou fille de moins de vingt et un ans, non marié de cette personne."

D'après la preuve, il est clair, qu'un membre de la famille de Mme Mariano, son mari, ne peut pas satisfaire aux prescriptions de l'immigration. En conséquence, si elle faisait une demande hors du Canada, il ne lui serait pas délivré de visa d'immigrant. Bien qu'elle ait fait une demande au Canada (tel était son droit) les dispositions d'annulement contenues dans l'article 34(3) visant l'article 28(1) du Règlement sur l'immigration, ne s'appliquent pas dans cette instance. La Loi lui demande d'être en possession d'un visa d'immigrant valide et non périmé, ce qu'elle n'a pas.

 $\rm J'estime$  que l'article 28(1) du Règlement sur l'immigration, Partie I, est un motif valide pour ordonner son expulsion.

Je rejetterais l'appel.

Ottawa le 16 décembre 1969.

Pour l'appelant: Dr. D.P. Pandia avocat;

Pour l'intimé: Me P. Betournay.

26. Richard Cooper BOURRET et uxor, and children,

appellants,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 10, 1969: File: 69-859.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, Jean-Pierre Houle.

Section 15 - political persecution - proof of - Immigration Appeal Board Act: 15.

Held: After dismissing the appeal on law, the Board finds that on the evidence it is reasonable to believe the appellant will not be persecuted for political reasons, but there are sufficient compassionate and humanitarian grounds to warrant the exercise of its jurisdiction under section 15. Appellants are not such a security risk as to prevent them from remaining in Canada.

The judgment of the Board was delivered by:

### A.B. Weselak:

These are the appeals of Richard Cooper Bourret and of his wife from two deportation orders made by Special Inquiry Officer L. Fournier at Champlain Harbour Station, Quebec 2, P.Q., on the 26th day of June A.D. 1968 in the following terms:

In respect of the male appellant

"1) you are not a Canadian citizen;

2) you are not a person having Canadian domicile;

3) you are a member of the prohibited class described in paragraph (o) of Section 5 of the Immigration Act in that you are a member of a family accompanying members of that family namely your wife, Gladys Guevara y Carvajal de Bourret, and your two stepdaughters, Norma Gonzales Guevara and Guillermina Pilar Guevara, who are not admissible to Canada and, in my opinion, hardship would be involved by the separation of the family."

In respect of the female appellant and her two daughters, Norma Gonzales Guevara and Guillermina Pilar Guevara

26. Richard Coopper BOURRET et uxor, et enfants, appelants,

Le Ministre de la Main-d'oeuvre et de l'Immigration,

Date de la décision: le 10 décembre 1969; Dossier: 69-859.

Coram: Mlle J.V. Scott, président, A.B. Weselak, Jean-Pierre Houle.

Article 15 - punition pour activités politiques - preuve - Loi sur la Commission d'appel de l'immigration: 15.

Arrêt: Ayant rejeté l'appel en droit, la Commission conclut, se fondant sur la preuve, qu'il est raisonnable de croire que l'appelant ne sera pas puni pour des activités politiques, mais qu'il existe suffisamment de motifs de pitié et de considérations d'ordre humanitaire pour justifier l'exercice des pouvoirs qui lui sont attribués par l'article 15. Les appelants ne menacent pas la sécurité nationale de façon telle qu'il faille leur interdire de demeurer au Canada.

Le jugement de la Commission fut rendu par:

#### A.B. Weselak:

Appels de deux ordonnances d'expulsion rendues par l'enquêteur spécial L. Fournier le 26 juin 1968 à Champlain Harbour Station. Québec 2 (Québec) contre Richard Cooper Bourret et son épouse.

Contre l'appelant:

"1) you are not a Canadian citizen;

you are not a person having Canadian domicile:

3) you are a member of the prohibited class described in paragraph (o) of Section 5 of the Immigration Act in that you are a member of a family accompanying members of that family namely your wife, Gladys Guevara y Carvajal de Bourret, and your two step-daughters, Norma Gonzales Guevara and Guillermina Pilar Guevara, who are not admissible to Canada and, in my opinion, hardship would be involved by the separation of the family."

Contre l'appelant et ses deux filles, Norma Gonzales Guevara et Guillermina Pilar Guevara:

"1) you are not Canadian citizen;

2) you are not persons having Canadian domicile;

"1) you are not Canadian citizens;

2) you are not persons having Canadian domicile;

3) you are members of the prohibited class described in paragraph (p) of Section 5 of the Immigration Act in that you are not, in my opinion, bona fide non-immigrants."

At the original hearing of the appeal on 13 August 1968 the appellants were not present but were represented by Mr. A. MacDonald. The respondent was represented by Mr. T. Gill. This hearing was adjourned sine die with a request that the Department provide the Board with full information as to the admissibility of the appellants without regard to assessment as immigrant applicants in Canada. The hearing of the appeal was resumed on December 12th, 1969, with both appellants present but not represented by counsel, although written submission were filed on their behalf by R. Dale Carr-Harris, Barrister. The respondent was represented by Mr. T. Gill.

Richard Cooper Bourret is a forty year old citizen of the United States by birth. He apparently was awarded a Bachelor of Science degree by the University of Miami while teaching at that institution. During 1959 the appellant left the University of Miami to accept employment with Hughes Research Laboratories in Los Angeles. While residing in Florida Mr. Bourret made frequent visits to Cuba. It was during one of these visits that he met his wife, the former Gladys Guevara y Carvajal. They were married on November 3, 1956 in Havana.

Mrs. Bourret is a thirty-five year old citizen of Cuba and the mother of two daughters aged seventeen and fifteen years respectively. Both daughters are citizens of Cuba who accompanied their mother to Canada. Approximately six months after marriage Mrs. Bourret proceeded with her husband to the United States where she was granted permanent residence at Miami on March 9, 1957. She remained in the United States until 1962 when she returned to Cuba.

While employed in Los Angeles, Mr. Bourret joined the Fair Play for Cuba Committee, an organization controlled by the Socialist Workers Party; became a Castro sympathizer and took part in a number of demonstrations on behalf of the Committee. During 1962 he defected to Cuba, applied for and was granted asylum in that country as a political refugee. Considerable publicity was given Mr. Bourret's actions in Cuba as well as United States newspapers. As an example the Los Angeles Times of September 25, 1962 carrying a Havana dateline publicized Mr. Bourret's actions under the heading "Castro Gives Asylum to American Scientist".

The Cuban Government newspaper "Revolucion" quoted Bourret as saying that life in the United States had become impossible because of the families sympathies for Cuba and that the warmongering American Press.

3) you are members of the prohibited class described in paragraph (p) of Section 5 of the Immigration Act in that you are not, in my opinion, bona-fide non-immigrants."

Les appelants n'assistaient pas à la première audition de l'appel le 13 août 1968, mais ils y étaient représentés par M. A. MacDonald. M. T. Gill occupait pour l'intimé. Cette audition fut ajournée sine die et le Ministère fut prié de fournir à la Commission tous les renseignements sur l'admissibilité des appelants sans égard à l'appréciation comme requérants immigrants se trouvant au Canada. L'audition fut reprise le 12 décembre 1969. Les deux appelants étaient présents mais n'étaient pas représentés par un avocat, quoique M. R. Dale Carr-Harris avocat, ait soumis des arguments écrits en leur faveur. M. T. Gill occupait pour l'intimé.

Richard Cooper Bourret, âgé de 40 ans, est citoyen des Etats-Unis par naissance. Il semble avoir obtenu son baccalauréat en Sciences de l'Université de Miami tout en enseignant dans cette institution. Au cours de l'année 1959, l'appelant a quitté l'Université de Miami pour accepter un poste à la <u>Hughes Research Laboratories</u> à Los Angeles. Lorsqu'il vivait en Floride, M. Bourret se rendait souvent à Cuba. C'est au cours de l'une de ces visites qu'il rencontra son épouse, autrefois Gladys Guevara y Carvajal. Ils se marièrent le 3 novembre 1956 à la Havane.

Mme Bourret, âgée de 35 ans, est citoyenne de Cuba; elle est mère de deux filles âgées l'une de 17 et l'autre de 15 ans. Les deux filles sont citoyennes de Cuba et elles ont accompagné leur mère au Canada. Environ six mois après son mariage, Mme Bourret se rendit avec son mari aux États-Unis où on lui accorda la résidence permanente à Miami le 9 mars 1957. Elle est demeurée aux États-Unis jusqu'en 1962. Elle est alors retournée à Cuba.

Lorsqu'il travaillait à Los Angeles, M. Bourret est devenu membre du <u>Fair Play for Cuba Committee</u>, un organisme noyauté par le <u>Socialist Workers Party</u>; il devint sympathisant castriste et participa à un certain nombre de manifestations en faveur du comité. Au cours de l'année 1962 il passa à Cuba et demanda l'asile comme réfugié politique, ce qui lui fut accordé. Les journaux cubains aussi bien qu'américains accordèrent beaucoup de publicité aux activités de M. Bourret. Par exemple, le <u>Los Angeles Times</u> du 25 septembre 1962 publiait sous une rubrique de <u>la Havane un article sur les agissements de M. Bourret intitulé "Castro Gives Asylum to American Scientist".</u>

Le journal du gouvernement cubain Revolucion rapportait des paroles de M. Bourret selon lesquelles les sympathies cubaines de sa famille lui avait rendu la vie impossible aux États-Unis, l'hostilité de la presse américaine avait embrouillé et empoisonné l'esprit des gens au sujet de Cuba, Washington favorisait une politique de guerre ("war policy") et les had poisoned and confused the people about Cuba, that Washington favoured a "war policy" and that "progressive" scientists were not given sufficient "security" or "stimulus" for their work and were under the strict control of the United States Armed Forces. Such was Bourret's sympathies that he installed a large portrait of Castro on his front lawn.

Mr. Bourret, following admission to Cuba, was employed in the Physics Department of the University of Havana. In 1964, he travelled to Moscow, then to England where he was denied admission and returned to employed as a research scientist at the Academy of Sciences until the summer of 1966.

On June 13, 1965 Mr. Bourret and his family applied in Cuba for permanent residence in Canada. His application was denied. Notwithstanding the refusal of his application, the family without visas, gained admission to Canada at Halifax, N.S. on May 16, 1966 when claiming to be tourists who would be visiting for a one month period. Within nine days of admission Mr. Bourret filed an application for permanent residence. Despite the fact that as a tourist he was not permitted to take employment, he accepted employment at McGill University. Subsequently his application was denied. As he stated he was attempting to obtain visas for his family to the United States he was given until the completion of the 1966/67 academic year to obtain his visas and leave Canada. He did not obtain visas for the United States and therefore, proceeded to Cuba.

The Bourret family again arrived in Canada on a Soviet ship bound for Moscow, with all their personal effects including an automobile seeking entry as non-immigrants, were defied admission and ordered deported on 26 June 1968.

The wife and two daughters were validly denied admission as non-immigrants as although seeking admission as non-immigrants for ten days, they were in possession of the family car and all their assets. In addition, while seeking admission they expressed the desire to proceed to the United States but were not in possession of proof of admissibility to the United States and stated they were unwilling to return to Cuba. The family was not therefore in a position to leave Canada on or before the expiration of the ten day period.

The husband was validly denied admission under Section 5(0) of the Immigration Act as the evidence discloses that the wife and daughters are wholly dependent on the husband and the family appears to be a close knit unit.

Having found the grounds in the orders valid and made in accordance with the Immigration Act and Regulations thereunder the Board dismisses both appeals.

hommes de science progressistes ("progressive") ne recevaient pas suffisamment de sécurité ("security") ou n'étaient pas suffisamment stimulés ("stimulus") dans leur travail et étaient strictement surveillés par les forces armées américaines. Les sympathies de M. Bourret étaient telles qu'il installa un grand portrait de Castro sur la pelouse devant sa maison.

M. Bourret, après son admission à Cuba, fut employé au département de physique de l'Université de la Havane. En 1964, il s'est rendu à Moscou puis en Angleterre où on lui refusa l'admission. Il retourna à Moscou et près d'un mois plus tard il revint à Cuba où il fut employé comme assistant de recherche à l'Académie des sciences jusqu'à l'été de 1966.

Le 13 juin 1965, M. Bourret et sa famille demandèrent, de Cuba, la résidence permanente au Canada. Sa demande fut refusée. Malgré ce refus, la famille, sans visas, fut admise au Canada à Halifax, Nouvelle-Ecosse, le 16 mai 1966; ils avaient déclaré être des touristes en visite pour un mois. Dans les neuf jours qui suivirent son admission M. Bourret déposa une demande de résidence permanente. Malgré que, comme touriste, il n'avait pas le droit de tenir un emploi, il accepta un poste à l'Université McGill. Plus tard, sa demande fut refusée. Comme il déclara qu'il tentait d'obtenir des visas pour sa famille en vue d'entrer aux États-Unis, on lui accorda jusqu'à la fin de l'année scolaire 1966-1967 pour obtenir, ses visas et quitter le Canada. Il n'obtint pas de visas pour les États-Unis et par conséquent repartit pour Cuba.

La famille Bourret revint au Canada sur un navire soviétique en route pour Moscou, avec tous ses effets personnels, y compris une automobile, et ils demandèrent l'entrée comme non-immigrants. On leur refusa l'admission et on ordonna leur expulsion le 26 juin 1968.

Le refus opposé à l'épouse et aux deux filles était valide puisqu'elles demandaient l'admission comme non-immigrants pour une période de dix jours alors qu'elles étaient en possession de l'auto familiale et de tous leurs avoirs. De plus, lorsqu'elles demandèrent l'admission, elles exprimèrent l'intention de se rendre aux États-Unis, mais elles n'avaient pas de preuves d'admissibilité aux États-Unis et elles ne voulaient pas retourner à Cuba. La famille était donc incapable de quitter le Canada avant la fin ou à l'expiration de la période de dix jours.

Le refus d'admission du mari était valide en vertu de l'article 5(o) de la Loi sur l'immigration puisque la preuve révèle que sa femme et ses filles lui sont entièrement à charge et la famille semble être bien unie.

Ayant trouvé que les motifs des ordonnances sont valides et conformes à la Loi sur l'immigration et à son règlement d'application, la Commission rejette les deux appels.

Having dismissed the appeals under Section 14 of the Immigration Appeal Board Act the Board must consider the exercise of its discretion under Section 15 of the said Act.

As the appellants are not permanent residents of Canada, the Board's discretion is limited to Section 15(1)(b) which reads:

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that

(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
- (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board is not satisfied on a reading of the evidence as a whole that the male appellant will be punished for activities of a political nature. It finds it cannot accept his statement on page 11 of the reopened Inquiry where the record reveals:

"Q. Do you believe that at the present time you would have any difficulty in returning to Cuba?

A. At this point I have expressed violently hostile opinions of the Cuban regime so extenseively that it might be worth my neck to go there or not to go there. During my first absence from Cuba spent in Canada an unofficial rumor or accusation circulated among members of the administration of the housing project where I lived that I was undoubtedly a member of the C.I.A. Though nothing came of this upon my return to Cuba, I would be reluctant to try my luck a second time or attempt fate a second time."

The appellant had after being employed at McGill returned to Cuba without incident. He stated in evidence that it was very difficult for Cubans to leave Cuba, yet he was granted an exit visa and permitted to take with him his personal belongings including his automobile. He had in fact been a privileged person in Cuba. Page 11 supra discloses:

Ayant rejeté les appels en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission doit considérer l'exercice de sa discrétion en vertu de l'article 15 de ladite Loi.

Puisque les appelants ne sont pas résidants permanents au Canada, la discrétion de la Commission est limités à l'article 15(1)(b) qui dit ceci:

- "15(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
  - (b) dans le cas d'une personne qui n'était pas un résidant permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
    - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
    - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accorder à la personne contre qui l'ordonnance avait été rendue le droit d'entrer ou de débarquement."

La Commission n'est pas convaincue à la lecture de l'ensemble de la preuve que l'appelant sera puni pour des activités de caractère politique. Elle ne peut accepter cette déclaration de l'appelant à la page 11 de la reprise de l'enquête:

- "Q. Do you believe that at the present time you would have any difficulty in returning to Cuba?
- A. At this point I have expressed ciolently hostile opinions of the Cuban regime so extensively that it might be worth my neck to go there or not to ge there. During my first absence from Cuba spent in Canada an unofficial rumor or accusation circulated among the members of the housing project where I lived that I was undoubtedly a member of the C.I.A. Though nothing came of this upon my return to Cuba, I would be relectant to try my luck a second time or attempt fate a second time."

L'appelant, après avoir été employé à McGill, est retourné à Cuba sans incident. Il a déposé en preuve qu'il était très difficile pour les Cubains de quitter Cuba, et pourtant on lui a accordé un visa

"Q. May I ask why you were a privileged person in Cuba?

A. I refer to a relatively privileged position which I enjoyed in Cuba. All foreigners employed by the Cuban government, this includes of course professors, teachers and so on, received special rations and were generally given preferential treatment. In particular, the possibility of leaving Cuba was generally regarded by the Cuban people as the greatest privilege of all."

These statements, considered with other evidence on Record incline the Board to be of the opinion that it is reasonable to believe the appellant will not be persecuted for political reasons.

As to reasonable grounds for believing the appellants will suffer undue hardship or that there is the existence of compassionate or humanitarian grounds, the Board considering the evidence of Record is of the opinion that sufficient grounds exist to warrant it exercising its discretion in favour of the appellants. These grounds are:

- (1) That the male appellant is a United States citizen and while he can enter the United States of America, his wife because of her activities in "The Fair Play for Cuba" has been barred admission to the United States of America under Section 212(a)28 of the Immigration and Nationality Act. It is therefore impossible for the family as a unit to enter the United States of America.
- (2) The appellants in evidence stated to the Board that political and economic conditions in Cuba are steadily deteriorating and continue to do so at an alarming rate. As a result the male appellant has been since 1963 consistently attempting to obtain admission to a western country. He finds working conditions in Cuba unbearable and living under conditions in Cuba frustrating and discouraging. As to the female appellant who is a Cuban National, the Cuban natives resent her presence in Cuba as a privileged person.
- (3) The male appellant since his return to Canada has been doing post graduate work at Simon Fraser University, has worked on several research projects and has had numerous articles published relating to Physics. Letters on file from professors and colleagues speak highly of his academic ability and character. He has a firm offer of employment by an IBM firm in British Columbia.
- (4) The two daughters are in school and have adapted themselves to this country and also wish to remain.

The Board for the above and other considerations in the Record would exercise its discretion in favour of the appellants. In doing so it must consider the over riding consideration that if it finds the appellants to be a security risk it must not, in the public interest, allow the appellants to remain in Canada.

de sortie et on lui a permis d'apporter avec lui ses possessions personnelles, y compris son automobile. Il était en fait une personne privilégiée à Cuba. La page 11 du procès-verbal révèle ce qui suit:

"Q. May I ask why you were a privileged person in Cuba?
A. I refer to a relatively privileged position which I enjoyed in Cuba. All foreigners employed by the Cuban government, this includes of course professors, teachers and so on, received special rations and were generally given preferential treatment. In particular, the possibility of leaving Cuba was generally regarded by the Cuban people as the greatest privilege of all."

Ces déclarations, considérées avec d'autres preuves au dossier, portent la Commission à émettre l'avis qu'il est raisonnable de croire que l'appelant ne sera pas puni pour des raisons politiques.

Quant aux motifs raisonnables de croire que les appelants seront soumis à de graves tribulations ou qu'il existe des motifs de pitié ou des considérations d'ordre humanitaire, la Commission estime, considérant les preuves au dossier, qu'il existe suffisamment de motifs pour qu'elle exerce sa discrétion en faveur des appelants. Ces motifs sont les suivants:

- (1) L'appelant est un citoyen des États-Unis et même s'il peut entrer aux États-Unis d'Amérique, il est interdit à son épouse, à çause de ses activités dans le Flair Play for Cuba, d'entrer aux États-Unis d'Amérique en vertu de l'article 212 (a) 28 de l'Immigration and Nationality Act., Il est donc impossible que la famille, comme cellule, rentre aux États-Unis d'Amérique.
- (2) Les appelants ont déposé en preuve devant la Commission que les conditions économiques et politiques à Cuba se déteriorent continuellement et à un rythme dangereux. Il en résulte que, depuis 1963, l'appelant a constamment cherché à obtenir l'admission dans un pays de l'ouest. Il trouve les conditions de travail à Cuba insupportables et la vie, dans ces conditions frustrante, et décourageante. Quant à l'appelante, elle est originaire de Cuba et les Cubains lui tiennent rigueur de son statut de privilégiée.
- (3) L'appelant, depuis son retour au Canada, a fait des recherches avancées à l'Université Simon Fraser; il a participé à plusieurs projets de recherches et il a publié un grand nombre d'articles en physique. Des lettres déposées par des professeurs et des collègues disent beaucoup de bien de son talent intellectuel et de son caractère. Il a une offre d'emploi sûr d'une firme IBM en Colombie-Britannique.
- (4) Les deux filles sont à l'école; elles se sont adaptées à notre pays et elles souhaitent y demeurer.

Pour ces motifs et pour d'autres considérations qui apparaissent au dossier, la Commission exercerait sa discrétion en faveur des appelants.

The appellants were examined at the original Inquiry, at the reopened Inquiry and then at the resumed hearing by the Board. On this evidence as a whole the Board is of the opinion that the appellants' activities in the organization "Fair Play for Cuba" were activated by a genuine sympathy with the apparent desire through revolution of the Cubans to better their lot, by overthrowing the Batista Regime in favour of Castro, coupled with a resentment toward the United States Government who apparently was prepared to interfere with the internal affairs of Cuba, if necessary, by invasion of Cuba. There is no evidence of either of the appellants being Communist Party Members or having been indoctrinated into the Party. The evidence reveals that the feelings of the female appellant were intense in this regard and it would only be natural for the husband to be very s mpathetic toward her and adopt the same feeling.

They therefore left the United States of America and went to Cuba where the appellant, because of his feelings and those of his wife made some ill advised statements. They soon found that the surge of prosperity and well being which existed in Cuba immediately following the Revolution quickly disappeared to their complete disillusionment. They then realized the gravity of their mistake and then made every effort to escape from the unpleasant if not unbearable environment. The appellant has since his return to Canada been voluntarily interrogated by the Royal Canadian Mounted Police and has volunteered to be fully interrogated by the Federal Bureau of Investigation.

The appellants who appeared before the Board appeared to be credible witnesses. The respondent apart from inferences drawn from the evidence of Record introduced no further evidence in this regard. Considering the evidence as a whole the Board draws the conclusion that the appellants are not such a security risk as to prevent them from remaining in Canada and directs that the deportation order be stayed for a period of two years with the appellants required to report to the nearest Immigration officer every three months.

Dated at Ottawa, this 17th day of December 1969.

Concurred in by: Miss J.V. Scott, Chairman, and Jean-Pierre Houle.

For the appellants: A. MacDonald and R. Dale Carr-Harris, Barristers; For the respondent: T. Gill, Esq.

Ce faisant, elle doit tenir compte de cette condition primordiale: si la présence des appelants constitue un risque à la sécurité nationale, elle ne peut, dans l'intérêt public, leur permettre de demeurer au Canada.

Les appelants ont été interrogés au début de l'enquête, à la reprise de l'enquête et à la reprise de l'audition de la Commission. La Commission estime, se fondant sur cette preuve, que l'activité des appelants au sein de l'organisme "Fair Play for Cuba, était motivée par une véritable sympathie pour l'effort que semblaient vouloir faire les Cubains en vue d'améliorer leur sort par la révolution en renversant le régime Batista en, faveur de Castro, et par leur ressentiment à l'égard du gouvernement des Etats-Unis, qui semblait être prêt à intervenir dans les affaires internes de Cuba, par l'invasion si c'était nécessaire. Rien ne prouve que les appelants aient été membres du Parti communiste ou qu'ils aient été endoctrinés par ce parti. La preuve démontre que l'appelante entretenait à cet égard un sentiment très profond et il n'est que normal que son mari ait été très sympathique à son endroit et en soit venu à partager ce sentiment.

Ils quittèrent par conséquent les États-Unis d'Amérique et se rendirent à Cuba où l'appelant, à cause de ses convictions et de celles de sa femme, fit des déclarations peu judicieuses. Ils se rendirent vite compte, à leur grande déception, que le courant de prospérité qui avait suivi immédiatement la révolution cubaine se résorbait. Ils comprirent alors la gravité de leur erreur et ils firent tous les efforts pour s'échapper de ce milieu désagréable sinon insupportable. L'appelant, depuis son retour au Canada s'est volontairement soumis aux interrogatoires de la Gendarmerie royale du Canada et du Federal Bureau of Investigation. Les appelants, qui ont témoigné devant la Commission, ont semblé être des témoins dignes de foi. L'intimé, à part les inférences tirées de la preuve au dossier, n'a présenté aucune autre preuve à cet égard. Se fondant sur l'ensemble de la preuve, la Commission conclut que les appelants ne menacent pas la sécurité d'une façon telle qu'il faille leur interdire de demeurer au Canada et elle ordonne de surseoir à l'ordonnance d'expulsion pour une période de deux ans et que les appelants se présentent au fonctionnaire de l'immigration le plus près à tous les trois mois.

Fait à Ottawa, le 17 décembre 1969.

Ont souscrit: Mlle J.V. Scott, président, et Jean-Pierre Houle.

Pour les appelants: Mes A. MacDonald et R. Dale Carr-Harris; Pour l'intimé: M. T. Gill.

27.
Pierre Hubert Charles JANVIER et uxor,

appellant,

ν.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 18, 1969; File: 68-6103.

Coram: Miss J.V. Scott, Chairman, Jean-Pierre Houle, Gérard Legaré.

Inquiry - SIO's bias - whether it can be raised on appeal. - Whether full and proper inquiry. - Immigration Act: 11(3).

 $\frac{\text{Held}}{\text{able}}$ : The test of real likelihood of bias is objective: "the reasonable apprehension of a reasonable man apprised of the facts" and a court cannot go so far as to consider witnesses' impressions of the tone of voice or facial expression of the person making the statement complained of. The Court can go no further than no examine the words used to see if they would arouse a reasonable apprehension of bias in the mind of a reasonable man.

Further, where an appellant is represented by legal counsel at an inquiry, and a reasonable likelihood of bias on the part of the Special Inquiry Officer becomes evident to such counsel in the course of the inquiry - as in the present case - objection must be taken at the inquiry, and not raised for the first time on appeal. Failure to make such an objection amounts to submission to the jurisdiction of the Special Inquiry Officer, and unless there is evidence of actual prejudice suffered by the appellant which would amount to a denial of natural justice, such failure to object is fatal to the appellant's case.

In the instant appeal, it is evident on the fact of the record that the appellant did suffer actual prejudice, if not from the bias of the Special Inquiry Officer, then from his failure to conduct a full and proper inquiry relating to the work done in Canada by appellants. The Special Inquiry Officer went through the motions of holding a full and proper inquiry - he listened to M. Janvier's testimony and to that of his alleged employer, but with a "closed mind".

The judgment of the Board was delivered by:

### J.V. Scott:

Appeals from two orders of deportation both dated September 19, 1968 and in identical terms, made against the appellants, Pierre Hubert Charles Janvier and his wife, Marie Gertha Monique Janvier née Georges, by Special Inquiry Officer, R. St-Louis, at Hull, Quebec, as follows:

27.
Pierre Hubert Charles JANVIER, et uxor,

appelant,

ν.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 18 décembre 1969; Dossier: 68-6103.

Coram: Mlle J.V. Scott, président, Jean-Pierre Houle, Gérard Legaré.

Enquête - partialité de l'enquêteur spécial - s'il peut être soulevé en appel. - si enquête complète et régulière. - Loi sur l'immigration: 11(3).

Arrêt: Le critère déterminant la vraisemblance de réelle partialité est objectif: "the reasonable apprehension of a reasonable man apprised of the facts" et une cour ne peut aller jusqu'à considérer les impressions du témoin sur le ton de la voix ou les expressions du visage de la personne dont se plaint le témoin déclarant. La Cour s'arrête à l'examen des mots utilisés pour voir s'ils éveilleraient dans l'esprit d'un bon père de famille une appréhension raisonnable de partialité.

Par ailleurs, si lors de l'enquête un appelant est représenté par un conseiller qui se rend compte de l'apparition d'une vraisemblance réelle de partialité de l'enquêteur spécial - comme dans cette cause - l'objection doit être posée à l'enquête et non soulevée pour la première fois en appel. Omettre de faire cette objection relative à la compétence de l'enquêteur spécial est fatal à la cause de l'appelant, à moins qu'une preuve montre que l'appelant a souffert d'un réel préjudice duquel résulterait un déni de justice naturelle.

D'après les faits contenus dans le dossier il est manifeste que dans cette instance l'appelant a souffert de réel préjudice si ce n'est à cause de la partialité de l'enquêteur spécial, alors du fait que l'enquêteur spécial n'a pas procédé à une enquête complète et régulière (enquête sur le travail effectué au Canada par les appelants). L'enquêteur spécial a suivi les différentes étapes d'une enquête complète et régulière - il a reçu les témoignages de M. Janvier et de son prétendu employeur mais avec un "esprit obtus".

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott président:

Appels de deux ordonnances d'expulsion, datées du 19 septembre 1968 rédigées en des termes identiques, rendues par l'enquêteur spécial R. St-Louis, à Hull Québec contre les appelants Pierre Hubert Charles Janvier et son épouse, Marie Gertha Monique Janvier née Georges. Les ordonnances disent:

"1) vous n'êtes pas un citoyen canadien;

2) vous n'êtes pas une personne ayant acquis le

domicile canadien;

3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:

 a) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements

de la Loi sur l'Immigration;

 b) votre passeport ne contient pas de certificat médical dûment signé par un médecin du Ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration;

c) vous avez accepté un emploi au Canada sans l'autorisation d'un fonctionnaire du Ministère contrairement aux dispositions de l'alinéa (e) du paragraphe (3) de l'article 34 de la première partie des Règlements de

la Loi sur l'Immigration."

The male appellant is 32 years of age and the female appellant 24. They are both citizens of Halti and have one child born in 1968, residing in that country. They were admitted to Canada as non-immigrant visitors on April 23, 1968, for a period to expire May 7, 1968, and proceeded directly to the home of Me Pierre Desrosiers, a Notary in Hull, Quebec who had made their acquaintance in Halti. They applied for permanent residence in Canada on May 1, 1968.

On May 3, 1968, M. Janvier made what purports to be a statutory declaration before one J.A.G. Dubé, described as "témoin, fonctionnaire autorisé". Mme Janvier signed this "declaration" although there is nothing therein to indicate that she was a party thereto.

This document is as follows: (Exhibit "E" to the Minutes of Inquiry):

# "DECLARATION"

Je, Charles Hubert JANVIER, résidant à 27, rue Millar, Hull, ayant soumis une demande de résidence permanente au Canada à la Division de l'Immigration, déclare ce qui suit:

 Que j'ai été admis au Canada à titre de visiteur le 22 avril 1968 à l'Aéroport International de Montréal à Dorval.

- "1) vous n'êtes pas un citoyen canadien;
- 2) vous n'êtes pas une personne ayant acquis le domicile canadien:
- 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:
  - a) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration;
  - b) votre passeport ne contient pas de certificat médical dûment signé par un médecin du Ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration;
  - c) vous avez accepté un emploi au Canada sans l'autorisation d'un fonctionnaire du Ministère contrairement aux dispositions de l'alinéa (e) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration."

L'appelant est âgé de 32 ans et l'appelante de 24 ans. Ils sont tous deux citoyens de Halti et ont un enfant né en 1968 qui demeure dans ce pays. Le 23 avril 1968 ils ont été admis au Canada en qualité de visiteur non-immigrant pour une durée temporaire qui s'achevait le 7 mai 1968, et sont allés directement à Hull, Québec chez Me Desrosiers, notaire, qui avait fait leur connaissance à Halti. Ils ont fait une demande pour résider de façon permanente au Canada le 1 mai 1968.

Le 3 mai 1968 M. Janvier a fait, ce qui est présenté comme une "déclaration statutaire" devant un dénommé J.A.G. Dubé, décrit comme "témoin fonctionnaire autorisé". Mme Janvier a signé cette "déclaration" bien que rien dans cette déclaration indique qu'elle en soit partie.

Ce document dit: (pièce à l'appui "E" du procès-verbal de l'enquête)

### "DECLARATION"

Je, Charles Hubert JANVIER, résidant à 27, rue Millar, Hull, ayant soumis une demande de résidence permanente au Canada à la Division de l'Immigration, déclare ce qui suit:

- Que j'étais alors accompagné de mon épouse, Marie Gertha Monique Georges, née le 26 mai 1956 à Port-au-Prince, Haîti, et que j'ai épousée à Port-au-Prince le 1<sup>er</sup> avril 1967. Que nous avons des billets payés par le Notaire Pierre Desrosiers, pour retourner à Haîti par avion.
- 3. Que je suis moi-même citoyen de Hafti par naissance en ce pays le 3 novembre 1937, et que je suis le père d'une fille, Sophia Janvier, née le 13 février 1968, à Port-au Prince, Hafti et dont nous avons confié la garde à mon père, Jean-Baptiste Janvier 53 avenue Fouchard, Port-au-Prince, Hafti. Que j'ai l'intention de faire immigrer ma fille au Canada le plus tôt possible, si ma propre demande ainsi que celle de mon épouse sont approuvées.
- 4. Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada; et nous avons commencé à travailler pour le notaire Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968.
- 5. Que j'ai décidé de venir m'établir au Canada durant la lère semaine d'avril 1968 parce que le Notaire Pierre Desrosiers est venu à Hafti et m'a offert un emploi comme secrétaire, avec fonctions principales de classeur de dossiers et ainsi que chauffeur. Il a également offert un emploi à mon épouse à cette occasion, au salaire mentionné au paragraphe précédent.
- 6. Que lorsque on m'a demandé à l'Aéroport de Dorval quel était le but de mon entrée ici, j'ai répondu que je venais pour visiter et étudier les possibilités d'établissement au Canada, même si je savais que j'avais l'intention de demeurer en permanence au Canada avec mon épouse:- Parce qu'on ne me l'a pas demandé.
- Que si ma demande est approuvée par la Division de l'Immigration du Canada, je respecterai toutes les lois et règlements du Canada et de ses provinces.

Je fais cette déclaration solennelle, croyant, en conscience, qu'elle est vraie, et sachant qu'elle a la même force et le même effet que si elle était faite sous serment et en vertu de la Loi sur la preuve au Canada.

- Que j'ai été admis au Canada à titre de visiteur le 22 avril 1968 à l'Aéroport International de Montréal à Dorval.
- Que j'étais alors accompagné de mon épouse, Marie Gertha Monique Georges, née le 26 mai 1956 à Port-au Prince, Haîti, et que j'ai épousée à Port-au-Prince le ler avril 1967. Que nous avons des billets payés par le Notaire Pierre Desrosiers, pour retourner à Haîti par avion.
- 3. Que je suis moi-même citoyen de Hatti par naissance en ce pays le 3 novembre 1937, et que je suis le père d'une fille, Sophia Janvier, née le 13 février 1968, à Port-au-Prince, Hatti et dont nous avons confié la garde à mon père, Jean-Baptiste Janvier, 53 avenue Fouchard, Port-au-Prince, Hatti. Que j'ai l'intention de faire immigrer ma fille au Canada le plus tôt possible, si ma propre demande ainsi que celle de mon épouse sont approuvées.
- 4. Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada, et nous avons commencé à travailler pour le notaire Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968.
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- 6. Que lorsque on m'a demandé à l'Aéroport de Dorval quel était le but de mon entrée ici, j'ai répondu que je venais pour visiter et étudier les possibilités d'établissement au Canada, même si je savais que j'avais l'intention de demeurer en permanence au Canada avec mon épouse: - Parce qu'on ne me l'a pas demandé.
- 7. Que si ma demande est approuvée par la Division de l'immigration du Canada, je respecterai toutes les lois et règlements du Canada et de ses provinces.

Je fais cette déclaration solennelle, croyant, en conscience, qu'elle est vraie, et sachant qu'elle a la même force et le même effet que si elle était faite sous serment et en vertu de la Loi sur la preuve au Canada.

Déclaré devant moi à Hull, P.Q., ce 3<sup>e</sup> jour de mai 1968.

> C.H. Janvier (signé) Signature du candidat

J.A.G. Dubé, Témoin - Fonctionnaire autorisé. Signature de l'épouse"

Mme Charles Janvier (signé)

The inquiries in respect of M. and Mme Janvier took place on September 18, 1968. M. Janvier was represented by Me R. Bélec and Me Desrosiers (who retired as counsel in the middle of the inquiry when he was called as a witness on behalf of M. Janvier). Mme Janvier whose inquiry was held immediately after that of her husband, was represented by Me Bélec.

Both appeals were heard together. At the first hearing, Me Bélec represented the appellants and argued on the merits, (Me P. Bétournay represented the respondent), but almost at the end of his submissions to the Board, he made a suggestion, or an insinuation(accusation is too strong a word), that R. St-Louis, the Special Inquiry Officer, had been biased. His first comment on this point is to be found at page 23 of the transcript of appeal hearing of April 10, 1969:

> 'Maintenant, à ce stade-ci, il y aurait probablement une affaire assez délicate à traiter. J'en ai parlé un peu avec mon confrère. C'est sur l'attitude même de M. St-Louis et les conversations qu'il a eues avec Me DesRosiers et moi-même dans les pauses. Je ne sais pas si je devrais soulever cela à ce stade-ci des procédures, ou quoi. Je sais que j'en ai déjà parlé à l'officer supérieur, c'est M. St-Louis, en date du 16 janvier 1969. Je ne sais pas quelle est la procédure exactement à suivre ici. Je pensais même de venir témoigner sur ces conversations qu'on a eues dans les pauses lors de l'enquête, et les conversations qui ont été faites devant Me DesRosiers, en présence de Me DesRosiers, de M. St-Louis et de moi-même."

And at page 24, questioned by the Chairman:

"LA PRÉSIDENTE:

Est-ce une question de prouver le préjudice?

Me BELEC:

Oui, disons les préjugés de l'enquêteur. Maintenant, je me demande si...

Déclaré devant moi à Hull, P.Q., ce 3<sup>e</sup> jour de mai 1968.

C.H. Janvier (signé) Signature du candidat

J.A.G. Dubé, Témoin - Fonctionnaire autorisé.

Mme Charles Janvier (signé) Signature de l'épouse"

Les enquêtes relatives à M. et Mme Janvier ont été ouvertes le 18 septembre 1968. Me. R. Bélec et Me. Desrosiers (qui s'est retiré du conseil dans le milieu de l'enquête quand il a été cité comme témoin pour M. Janvier) occupaient pour M. Janvier. Me. Bélec occupait pour Mme Janvier dont l'enquête a été tenue immédiatement après celle de son époux.

Les deux appels ont été entendus ensemble. À la première audition Me. Bélec occupait pour les appelants et a plaidé au fond (Me. P. Bétournay occupait pour l'intimé) mais presque à la fin de la présentation de ses arguments devant la Commission, il a suggéré, ou insinué (accusé est un mot trop fort) que R. St-Louis, l'enquêteur spécial avait été partial. Sa première remarque sur ce point se trouve à la page 23 de la transcription de l'audition de l'appel du 10 avril 1969:

"Maintenant, à ce stade-ci, il y aurait probablement une affaire assez délicate à traiter. J'en ai parlé un peu avec mon confrère. C'est sur l'attitude même de M. St-Louis et les conversations qu'il a eues avec Me Des-Rosiers et moi-même dans les pauses. Je ne sais pas si je devrais soulever cela à ce stade-ci des procédures, ou quoi. Je sais que j'en ai déjà parlé à l'officer supérieur, c'est M. St-Louis, en date du 16 janvier 1969. Je ne sais pas quelle est la procédure exactement à suivre ici. Je pensais même de venir témoigner sur ces conversations qu'on a eues dans les pauses lors de l'enquête, et les conversations qui ont été faites devant Me DesRosiers, en présence de Me DesRosiers, de M. St-Louis et de moi-même."

et à la page 24, interrogé par le président:

"LA PRÉSIDENTE:

Est-ce une question de prouver le préjudice?

### M. HOULE (membre):

Les préjugés entraînant le préjudice."

The appeal hearing was adjourned, and was continued on June 27, 1969. Me M. Pharand replaced Me Bélec as counsel for the appellants, and Me. J.-P. Fortin represented the respondent. Both Me Bélec and Me Desrosiers testified as to the alleged incident, which occurred at "coffee-break" at the inquiry in respect of M, Janvier and which gave rise to the allegation of bias on the part of M. St-Louis. Their testimony was as follows:

Me Bélec questioned by Me Pharand: (page 6, transcript of appeal hearing, June 27, 1969):

- "Q. Est-ce qu'il y a eu un ajournement le premier matin de l'enquête?
  - R. Oui, au cours de l'enquête, à la première audition, il y a eu un ajournement pour une pause-café. A ce moment-là, nous sommes demeurés dans le bureau où était monsieur St. Louis. Nous étions monsieur St-Louis, le notaire Desrosiers et moi-même. La secrétaire était sortie du bureau pour aller chercher du café de même que monsieur Janvier était sorti de la salle. C'est une pause qui a duré environ 15 ou 20 minutes.
  - Q. Est-ce qu'il y a eu une conversation à ce moment-là entre vous-même et monsieur St-Louis?
  - R. Nous avons commencé à discuter de l'immigration en général, il y a eu au moins deux propos qui ont retenu mon attention. Premièrement, à un moment donné, alors qu'on parlait des différents groupes ethniques, il nous a dit, "toutes les fois qu'il y a un Haftien qui vient au pays, on a des troubles avec. Au cours de la conversation par la suite, on a parlé de l'immigration en général. A ce moment-là, il nous a dit: "lorsque les immigrants arrivent au pays, ils voudraient qu'on conforme nos habitudes de vie à la leur. Ils vivent 3 ou 4 familles dans une maison, ils ne dépensent pas, ils ont un bon compte de banque et après 4 ou 5 ans, ils ont une automobile, une maison, moi, ça fait 25 que je travaille et ils ont le porte-feuille plus épais que le mien". C'est à la suite de ces réflexions qu'on s'est demandé où est-ce qu'on s'en allait avec l'enquête. Si je me souviens bien, lors de la période du diner, j'en ai discuté avec le notaire Desrosiers, je me suis demandé à ce moment-là si j'étais pour continuer, je me suis dit, je n'ai aucune chance. Ce sont là les propos que monsieur St-Louis a tenus sur l'immigration au cours de cette pause."

Me BELEC:

Oui, disons les préjugés de l'enquêteur. Maintenant, je me demande si...

M. HOULE (membre)

Les préjugés entraînent le préjudice."

L'audition de l'appel a été ajournée et reprise le 27 juin 1969. Me. M. Pharand a remplacé Me. Bélec au conseil des appelants et Me. J.P. Fortin a occupé pour l'intimé. Tant Me. Bélec, que Me. Desrosiers ont témoigné des incidents allégués, qui se sont passés lors d'une "pause-café" pendant l'enquête relative à M. Janvier; les allégations suggérant que M. St-Louis était partial se sont révélées à cette "pause. Leur témoignage a été le suivant:

Me. Bélec, questionné par Me. Pharand: (page 6 de la transcription de l'audition de l'appel, le 27 juin 1969):

- "Q. Est-ce qu'il y a eu un adjournement le premier matin de l'enquête?
- R. Oui, au cours de l'enquête, à la première audition, il y a eu un ajournement pour une pause-café. A ce moment-là, nous sommes demeurés dans le bureau où était monsieur St-Louis. Nous étions monsieur St-Louis, le notaire Desrosiers et moi-même. La secrétaire était sortie du bureau pour aller chercher du café de même que monsieur Janvier était sorti de la salle. C'est une pause qui a duré environ 15 ou 20 minutes.
- Q. Est-ce qu'il y a eu une conversation à ce moment-là entre vous-même et monsieur St-Louis?
- Nous avons commencé à discuter de l'immigration en général, il y a eu au moins deux propos qui ont retenu mon attention. Premièrement, à un moment donné, alors qu'on parlait des différents groupes ethniques, il nous a dit, "toutes les fois qu'il y a un Haftien qui vient au pays, on a des troubles avec". Au cours de la conversation par la suite, on a parlé de l'immigration en général. A ce moment-là, il nous a dit: "lorsque les immigrants arrivent au pays, ils voudraient qu'on conforme nos habitudes de vie à la leur. Ils vivent 3 ou 4 familles dans une maison, ils ne dépensent pas, ils ont un bon compte de banque et après 4 ou 5 ans. ils ont une automobile, une maison, moi, ça fait 25 que je travaille et ils ont le porte-feuille plus épais que le mien". C'est à la suite de ces réflexions qu'on s'est demandé où est-ce qu'on s'en allait avec l'enquête. Si je me souviens bien, lors de la période du diner, j'en ai discuté avec le notaire Desrosiers, je me suis demandé à ce

## Cross-examined by Me Fortin (page 9):

- "Q. Les propos que vous avez tenus tout à l'heure, pouvez-vous les préciser?
  - R. À ce moment-là on parlait de l'entrée en masse des immigrants. Si je me souviens bien, il y avait eu une entrée assez massive d'immigrants haftiens à Hull, un groupe où la police était intervenue, on avait à ce moment-là, si je me souviens bien, mentionné à monsieur St-Louis que monsieur et madame Janvier ne faisaient pas partie de ce groupe-là. Nous lui avions dit qu'il était possible qu'il y ait eu des difficultés avec l'autre groupe mais que les Janvier ne connaissaient pas les autres Haftiens. C'est à ce moment-là que j'ai dit ça, ce que je viens de raconter et monsieur St-Louis m'a précisé: "toutes les fois qu'un Haftien entre au pays, on a des troubles avec."
  - Q. Est-ce que c'était une constatation qu'il semblait faire?
  - R. Je ne le connais pas monsieur St-Louis. Chose certaine, on commence à avoir l'habitude devant les Tribunaux, si un Juge dit quelque chose de semblable...
  - Q. Vous aviez peur pour le résultat de votre cause?
  - R. Oui.
  - Q. Vous préjugiez que le Juge était préjugé?
  - R. Ça regardait mal.
  - Q. Est-ce que dans ces cas-là, est-ce qu'il n'existe pas des procédures pour empêcher qu'un Juge préjugé entende une cause?
  - R. À ce moment-là, j'ai pensé que j'en étais à ma première expérience devant un enquêteur spécial. Si je me souviens bien des explications au notaire Desrosiers, j'ai dit, peut-être qu'il serait mieux de continuer l'enquête. Nous avions déjà décidé d'aller en appel.
  - Q. Vous préjugiez de la décision?
  - R. Oui, plutôt au cours de l'enquête, on a bien vu qu'il ne considerait qu'um paragraphe de la déclaration et que même si on essaie d'expliquer la signature sur cette déclaration, on avait aucune chance.
  - Q. Si ces notes-là sont assez exactes, je constate que vous n'avez fait aucune objection?
  - R. C'était voulu.

moment-là si j'étais pour continuer, je me suis dit, je n'ai aucune chance. Ce sont là les propos que monsieur St-Louis a tenu sur l'immigration au cours de cette pause."

# Contre interrogé par Me. Fortin (à la page 9):

- "Q. Les propos que vous avez tenus tout à l'heure, pouvez-vous les préciser?
- R. À ce moment-là on parlait de l'entrée en masse des immigrants. Si je me souviens bien, il y avait eu une entrée assez massive d'immigrants haîtiens à Hull, un groupe où la police était intervenue, on avait à ce moment-là, si je me souviens bien, mentionné à monsieur St-Louis que monsieur et madame Janvier ne faisaient pas partie de ce groupe-là. Nous lui avions dit qu'il était possible qu'il y ait eu des difficultés avec l'autre groupe mais que les Janvier ne connaissaient pas les autres Haîtiens. C'est à ce moment-là que j'ai dit ça, ce que je viens de raconter et monsieur St-Louis m'a précisé: "toutes les fois qu'un Haîtien entre au pays, on a des troubles avec."
- Q. Est-ce que c'était une constatation qu'il semblait faire?
- R. Je ne le connais pas monsieur St-Louis. Chose certaine, on commence à avoir l'habitude devant les Tribunaux, si un Juge dit quelque chose de semblable...
- Q. Vous aviez peur pour le résultat de votre cause?
- R. Oui.
- Q. Vous préjugiez que le Juge était préjugé?
- R. Ça regardait mal.
- Q. Est-ce que dans ces cas-là, est-ce qu'il n'existe pas des procédures pour empêcher qu'un Juge préjugé entende une cause?
- R. À ce moment-là, j'ai pensé que j'en étais à ma première expérience devant un enquêteur spécial. Si je me souviens bien des explications au notaire Desrosiers, j'ai dit, peut-être qu'il serait mieux de continuer l'enquête. Nous avions déjà décidé d'aller en appel.
- Q. Vous préjugiez de la décision?
- R. Oui, plutôt au cours de l'enquête, on a bien vu qu'il ne considérait qu'un paragraphe de la déclaration et que même si on essaie d'expliquer la signature sur cette déclaration,on avait aucune chance.

- Q. Je constate que vous n'avez pas soulevé de problèmes lors de l'argumentation?
- R. Voici, la cause de madame Janvier a commencé vers les 2 heures et ça s'est terminé à 3 heures moins quart. Il a ajourné à 3 heures pour sa décision dans les deux cas. L'argumentation n'a pas été longue, nous avons fait une argumentation, j'ai parlé des questions humanitaires dans le cas présent, de la bonne foi, du témoignage du notaire Desrosiers, j'ai parlé des démarches de monsieur Desrosiers auprès de monsieur Dubé lorsqu'il a demandé toutes les formules à remplir, de la permission pour monsieur Janvier de travailler avec un salaire...."

# Me Desrosiers questioned by Me Pharand:

- ''Q. Maintenant, le premier matin de l'enquête tenue par monsieur St-Louis, est-ce qu'il y a eu un ajournement?
- R. À 11 heures et vingt, pas l'ajournement dans l'aprèsmidi, plutôt, il y a eu une pause-café, environ, peutêtre l heure après que l'enquête a débuté. L'enquête a débuté vers 9 heures et demie, il y a eu une pausecafé l heure après.
- Q. Est-ce que vous avez parlé avec monsieur St-Louis lors de la pause-café?
- R. Oui, monsieur et madame Janvier sont sortis pour aller dans le corridor, celle qui prenait les notes sténographiques est allée chercher du café, je suis resté avec l'avocat Bélec et monsieur St-Louis. À ce momentlà, monsieur St-Louis a tenu des propos qui m'ont un peu surpris.
- Q. Voulez-vous relater ces propos?
- R. D'une façon générale, à l'égard des immigrants..."

#### Me J.P. FORTIN:

"Voici, on demande de relater et le témoin dit: "D'une façon générale". Ce n'est pas la façon de répondre, je veux que le témoin réponde à la question et qu'il ne donne pas d'opinions. Qu'il raconte ce qu'il a entendu."

# LA PRESIDENTE:

"Rapportez les faits."

- Q. Si ces notes-là sont assez exactes, je constate que vous n'avez fait aucune objection?
- R. C'était voulu.
- Q. Je constate que vous n'avez pas soulevé de problèmes lors de l'argumentation?
- R. Voici, la cause de madame Janvier a commencé vers les 2 heures et ça s'est terminé à 3 heures moins quart. Il a ajourné à 3 heures pour sa décision dans les deux cas. L'argumentation n'a pas été longue, nous avons fait une argumentation, j'ai parlé des questions humanitaires dans le cas présent, de la bonne foi, du témoignage du notaire Desrosiers, j'ai parlé des démarches de monsieur Desrosiers auprès de monsieur Dubé lorsqu'il a demandé toutes les formules à remplir, de la permission pour monsieur Janvier de travailler avec un salaire..."

## Me Desrosiers questionné par Me Pharand:

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- R. A 11 heures et vingt, par l'ajournement dans l'aprèsmidi, plutôt, il y a eu une pause-café, environ, peut-être 1 heure après que l'enquête a débuté. L'enquête a débuté vers 9 heures et demie, il y a eu une pause-café l heure après.
- Q. Est-ce que vous avez parlé avec monsieur St-Louis lors de la pause-café?
- R. Oui, monsieur et madame Janvier sont sortis pour aller dans le corridor, celle qui prenait les notes sténographiques est allée chercher du café, je suis resté avec l'avocat Bélec et monsieur St-Louis. À ce moment-là, monsieur St-Louis a tenu des propos qui m'ont un peu surpris.
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#### Me M. PHARAND:

#### "O. Alors?

- R. Alors, monsieur St-Louis a tenu à l'égard des immigrants en général une attitude en disant que les immigrants venaient au Canada, qu'ils résidaient 2 ou 3 familles par logis, qu'ils s'entassaient les uns sur les autres et qu'au bout de quelques années, ils se montaient un compte de banque de \$15,000.00 ou \$20,000.00. Par la suite, c'est ce qu'il a dit, on s'apercevait qu'ils étaient propriétaires de 2 ou 3 immeubles alors que nos goussets restaient toujours de la même épaisseur. D'une façon plus particulière à l'égard des Haftiens, il a dit "Chaque fois qu'un Haftien rentre au pays, c'est un paquet de troubles."
- Q. Est-ce que vous avez discuté de ce propos avec monsieur Bélec plus tard?
- R. Oui, après la pause-café, l'enquête a continué, à l'heure du midi, on s'est demandé s'il y avait lieu de continuer cette enquête parce qu'il nous a semblé que l'idée de l'enquêteur était déjà bien arrêtée."

## Cross-examined by Me FORTIN:

- "Q. Alors, en vivant à 3 ou 4 familles par logis et en ménageant pour accumuler des biens, est-ce que ça dénote un préjugé?
  - R. De la façon dont cela a été dit, oui, je trouve que monsieur St-Louis avait l'air d'un homme frustré.
  - Q. Pouvez-vous décrire de quelle façon?
  - R. Quand on est un officier de l'immigration, il me semble qu'on ne doit pas avoir au préalable une attitude telle vis-à-vis les immigrants.
  - Q. Qu'est-ce que monsieur St-Louis a dit?
  - R. L'impression que ça laissait, c'était que les immigrants venaient au Canada pour s'enrichir à nos dépens.
  - Q. Vous ne pensez que vous avez pu inférer des choses que monsieur St-Louis ne pensait pas?
  - R. Je répète ce qu'il a dit d'une façon générale et d'une façon particulière à l'égard des Haltiens.

# LA PRESIDENTE:

"Rapportez les faits."

### Me M. PHARAND:

### "Q. Alors?

- R. Alors, monsieur St-Louis a tenu à l'égard des immigrants en général une attitude en disant que les immigrants venaient au Canada, qu'ils résidaient 2 ou 3 familles par logis, qu'ils s'entassaient les uns sur les autres et qu'au bout de quelques années, ils se montaient un compte de banque de \$15,000.00 ou \$20,000.00. Par la suite, c'est ce qu'il a dit, on s'apercevait qu'ils étaient propriétaires de 2 ou 3 immeubles alors que nos goussets restaient toujours à la même épaisseur. D'une façon plus particulière à l'égard des Haftiens, il a dit "Chaque fois qu'un Haftien rentre au pays, c'est un paquet de troubles."
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## Contre-interrogé par Me Fortin:

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  - R. De la façon dont cela a été dit, oui, je trouvé que monsieur St-Louis avait l'air d'une homme frustré.
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- R. Quand on est un officier de l'immigration, il me semble qu'on ne doit pas avoir au préalable une attitude telle vis-à-vis les immigrants.
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- Q. Vous ne pensez que vous avez pu inférer des choses que monsieur St-Louis ne pensait pas?

- Q. Cette impression, vous l'aviez avant ça?
- R. Disons qu'elle peut se rattacher à d'autres faits extérieurs.
- Q. C'était quoi ces autres faits extérieurs?
- Ca remonte à ma première démarche au bureau de l'immigration, pour avoir le permis de résidence permanente pour les Janvier. À ce moment-là, on m'a remis des formules pour savoir de quoi il s'agissait. Lorsque le jour est venu pour les Janvier de se présenter au bureau de l'immigration, je les ai présentés à l'officer, je les ai laissés avec l'officier pour qu'ils complètent leurs formules de demande. Au cours de cette entrevue, en plus de la formule habituelle, usuelle, j'ai appris de monsieur Janvier qu'on lui avait fait signer un autre document qui avait été préparé et dactylographié par l'officier lequel document, on ne pouvait pas, on ne voulait pas lui remettre une copie, lequel document, on a eu connaissance seulement 4 ou 5 mois après. Tout cet enchaînement d'évènements m'ont laissé perplexe sur la façon dont on appliquait la loi de l'Immigration. J'ai trouvé à ce moment-là qu'on l'exerçait d'une façon discriminatoire.
- Q. Est-ce que monsieur St-Louis était là la première fois?
- R. Oui, pardon, non, il n'était pas là. Toute l'enquête a tourné autour de cette déclaration qui a été faite en marge de la déclaration régulière.
- Q. C'était la seule déclaration de monsieur Janvier?
- R. Oui, avec la formule d'application.
- Q. Vous considérez que le fait qu'on a demandé des questions à monsieur Janvier et qu'on lui ait présenté une formule de déclaration qu'il pouvait signer ou ne pas signer, vous considérez que ça constitue un préjugé ou une manipulation de la Loi de l'immigration?
- R. Ça peut, oui."

What are the standards to be applied in determining whether there has been bias or partiality on the part of a quasi-judicial administrative officer?

In Re Gooliah and Minister of Citizenship and Immigration (1967) 63 D.L.R. (2d) 224 the Manitoba Court of Appeal (Monnin, J.A. dissenting) dealt with the question at length. There, Gooliah had been ordered deported after an inquiry held by a Special Inquiry Officer. The deportation order was quashed on an application by way of certiorari, and the majority of the court of appeal affirmed this judgment. In the course of his judgment Freedman, J.A. said (p 227 ff):

"Bias may be of two kinds. It may arise from an interest in the proceeding. That indeed is the kind of bias which is most frequently encountered in cases coming before the Courts. Sometimes it is a direct pecuniary or proprietary interest in the subject-matter of the proceedings. A person possessing such an interest is disqualified from sitting as a judge thereon. Sometimes the interest is not financial but arises from a connection with the case or with the parties of such a character as to indicate likelihood of bias". The officer may in fact have no bias. "A real likelihood of bias", however, is enough to disqualify him from sitting as a judge on the matter. For "justice should not only be done, but should manifestly and undoubtedly be seen to be done": R. v. Sussex Justices, Ex p. McCarthy, (1924) 1 K.B. 256 at p. 259.

That is the first kind of bias; and it is well to say at once that it is not able to be invoked in the present case. Mr. Brooks, of course, has no pecuniary interest in the matter. As for his having a non-pecuniary connection with the case of such a character as to disable him from functioning as a judge thereon, something more needs be said. Mr. Brooks is an officer of the Immigration Branch at Winnipeg. That is to say, he is an officer of the defendant Department, one of the parties to the litigation. Ordinarily, in a dispute between two parties, an officer of one of them may not properly assume the role of judge. But in the present case the statute permits that very thing. Section 11(1) of the Immigration Act, R.S.C. 1952, c. 325, is in the following terms:

11(1) Immigration officers in charge are Special Inquiry Officers and the Minister may nominate such other immigration officers as he deems necessary to act as Special Inquiry Officers.

This statutory sanction effectively shields Mr. Brooks against any charge that in serving as a Special Inquiry Officer he was disqualified by bias arising from or based upon interest.

Something more than mere interest must accordingly be sought. This brings us to the second kind of bias -- namely, actual bias in fact. It may exist independently of a person's ordinary office. That, it is alleged, is what occurred here. It is contended that from his strategic position as an officer of the Immigration Branch at Winnipeg, Mr. Brooks acquired a point of view in the case -- favourable to the Department, unfavourable to Mr. Gooliah -- and he brought this point of view to his handling and disposition of the case in the form of preconception, prejudgment, partiality and bias.

Care must be taken to ascertain the precise nature of Mr. Brooks' alleged breach of duty. That he may have known about the Gooliah matter before he entered upon his quasi-judicial

- R. Je répète ce qu'il a dit d'une façon générale et d'une façon particulière à l'égard des Haltiens.
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A quelles normes doit-on se référer pour déterminer si un fonctionnaire administratif quasi-judiciaire a été partial?

Dans l'affaire Re Gooliah et le ministre de la Citoyenneté et de l'immigration (1967) 63 D.L.R. (2d) 224 la Cour d'appel du Manitoba (Monnin, J.A. dissident) traite de cette question. Après une enquête tenue par l'enquêteur spécial une ordonnance d'expulsion a été rendue

contre Gooliah. L'ordonnance d'expulsion a été annulée par un bref de certiorari et la majorité de la Cour a confirmé ce jugement. Durant le jugement Freedman, J.A. a dit (p. 227 ss):

"Bias may be of two kinds. It may arise from an interest in the proceeding. That indeed is the kind of bias which is most frequently encountered in cases coming before the Courts. Sometimes it is a direct pecuniary or proprietary interest in the subject-matter of the proceedings. A person possessing such an interest is disqualified from sitting as a judge thereon. Sometimes the interest is not financial but arises from a connection with the case or with the parties of such a character as to indicate likelihood of bias". The officer may in fact have no bias. "A real likelihood of bias", however, is enough to disqualify him from sitting as a judge on the matter. For "justice should not only be done, but should manifestly and undoubtedly be seem to be done": R. v Sussex Justices, Ex p. McCarthy, (1924) 1 K.B. 256 at p. 259.

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Something more than mere interest must accordingly be sought. This brings us to the second kind of bias -- namely, actual bias in fact. It may exist independently of a person's ordinary office. That, it is alleged, is what occurred here. It is contended that from his strategic position as an officer of the Immigration Branch at Winnipeg, Mr. Brooks acquired a point of view in the case -- favourable to the Department, unfavourable to Mr. Gooliah

role as Special Inquiry Officer may well be the case. If so, it would not disqualify him; for the statute, in providing for the nomination by the Minister of such an immigration officer as Special Inquiry Officer, contemplated that very possibility. Nor would the mere possession of a tentative point of view on the case when he was on the threshold of the inquiry disqualify Mr. Brooks. Many a Judge, from having read the pleadings and related material in a case, finds himself in precisely that position. But he recognizes that to perform his task properly he must remain constantly in the grip of his judicial function and not yield to his preconceptions or become captive to unexamined and untested preliminary impressions. Against the Special Inquiry Officer it is urged that he allowed himself to do just that; nay more. It is alleged that he brought to the inquiry a closed mind; that he functioned not as judge but as prosecutor; and that his conduct of the inquiry throughout its course visibly stamps it as having been tainted with bias.

The learned judge then examined the conduct of the inquiry, and concluded that it fell below "the standard to which a person engaged in a judicial or quasi-judicial task is expected to conform."

In R. v. Moore Ex parte Brooks et al. (1969) 2 O.R. 677 application was brought on behalf of a Police Association against a board of commissioners for police for an order prohibiting His Honour Judge H.F. Moore, Co. Ct. J. from taking further proceedings in an arbitration to determine matters in dispute between the police association and the commissioners. Judge Moore was shown to have been a police commissioner for other Townships, i.e. a member of the bargaining agents on behalfs of the employers. Stewart J. in granting the application for prohibition, said, page 683 - "It seems clear that His Honour Judge Moore should not act as chairman of an arbitration board under this Act (the Police Act). With the best will in the world, he will be subject to bias, if not actual at least subconscious..." The learned judge then went on to deal at some length with the law relating to bias, and pointed out that at one time it was held that a person became ineligible to sit on an arbitration by reason of bias only if actual bias was shown. This is, however, no longer the law; R. v. Barnsley Licensing Justices, Ex p. Barnsley & District Licensed Victuallers Ass'n (1960) 2 Q.B. 167. The learned judge states (at page 684): "It is of vital importance to our system of justice that all such steps as possible should be taken to eliminate both injustice or the fear of injustice. The salutory rule I think should be that if a real apprehension be raised in the mind of a reasonable and intelligent man, fully apprised of the circumstances, that an appointee might well be swayed by bias, albeit unconscious, then such appointment should be set aside." (italics mine). He then goes on to quote S.A. de Smith in Judicial Review of Administrative Action, 1st ed. pp. 140-1, where the learned author says:

"The emphasis has shifted from the simple precepts of the law of nature to the more subtle refinements of public policy.

-- and that he brought this point of view to his handling and disposition of the case in the form of preconception, prejudgement, partiality, and bias.

Care must be taken to ascertain the precise nature of Mr. Brooks' alleged breach of duty. That he may have known about the Gooliah matter before he entered upon his quasi-judicial role as Special Inquiry Officer may well be the case. If so, it would not disqualify him; for the statute, in providing for the nomination by the Minister of such an immigration officer as Special Inquiry Officer, contemplated that very possibility. Nor would the mere possession of a tentative point of view on the case when he was on the threshold of the inquiry disqualify Mr. Brooks. Many a Judge, from having read the pleadings and related material in a case, finds himself in precisely that position. But he recongnizes that to perform his task properly he must remain constantly in the grip of his judicial function and not yield to his preconceptions or become captive to unexamined and untested preliminary impressions. Against the Special Inquiry Officer it is urged that he allowed himself to do just that; nay more. It is alleged that he brought to the inquiry a colsed mind; that he functioned not as judge but as prosecutor; and that his conduct of the inquiry throughout its course visibly stamps it as having been tainted with bias.

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Dans l'affaire R.C. Moore Ex parte Brooks et al (1969) 2 O.R. 677 une association de police en différend avec la Commission des Commissaires de Police, a demandé une ordonnance qui interdirait à l'honorable juge H.F. Moore, Co. Ct. J. de continuer à arbitrer le différend entre l'association de police et la commission. Il a été prouvé que le juge Moore avait été un commissaire de police pour d'autres villes, i.e. un membre qui représente les employeurs dans la commission d'arbitrage. Stewart J. en accordant la demande d'un bref de prohibition a dit page 683 - "It seems clear that His Honour Judge Moore should not act as chairman of an arbitration board under this Act (the Police Act). With the best will in the world, he will be subject to bias, if not actual at least subconscious..." Le docte juge a poursuivi et a traité longuement de la loi relative aux"préjudices", et a fait remarquer qu'il fut un temps il était soutenu qu'à qu'à cause de partialité une personne ne pouvait s'asseoir à une table d'arbitrage seulement si une réelle partialité avait été exposée. Toutefois ceci n'est plus la loi; R. c. Barnsely Licensing Justices, Ex p. Barnsley & District Licensed Victuallers Ass'n (1960) 2 O.B. 167. Le docte juge déclare (à la page 684): "It is of vital importance to our system of justice that all such steps as possible should be taken to In order that public confidence in the administration of justice may be fully maintained, no man who is himself a party to proceedings or who has any direct pecuniary interest in the result is qualified at common law to adjudicate on those proceedings. If, however, it is alleged that the adjudicator ... is to be suspected of partisanship ... the court will not hold him to be disqualified unless the circumstances point to a real likelihood of bias."

## and at page 149:

"A 'real likelihood' of bias appears to mean a substantial possibility of bias. The court, it has been said, will judge of the matter "as a reasonable man would judge of any matter in the conduct of his own business."

"The test of real likelihood of bias which has been applied in a number of leading cases in magisterial and liquor licensing law is based on the reasonable apprehension of a reasonable man apprised of the facts. It is no doubt desirable that all Judges, like Caesar's wife, should be above suspicion."

The learned judge cites many cases to support this view.

In the instant appeal, the allegation of bias was based on two statements made by the Special Inquiry Officer during the coffee break: (according to the testimony of Me Bélec):

- 1) "Lorsque les immigrants arrivent au pays, ils voudraient qu'on conforme nos habitudes de vie à la leur. Ils vivent 3 ou 4 familles dans une maison; ils ne dépensent pas; ils ont un bon compte de banque et après 4 ou 5 ans, ils ont une automobile, une maison. Moi, ça fait 25 ans que je travaille et ils ont le porte-feuille plus épais que le mien."
- 2) "Toutes les fois qu'il y a un Haftien qui vient au pays, on a des troubles avec."

In the Board's opinion, the first statement cannot give rise to a suspicion of reasonable likelihood of bias. In the first place, the words reported as having been used may be said to be complimentary rather than otherwise. True, Me Desrosiers testified (page 16, hearing June 27, 1969):

"De la façon dont cela a été dit, oui, je trouve que M. St-Louis avait l'air d'un homme frustré."

eliminate both injustice or the fear of injustice. The salutory rule I think should be that if a real apprehension be raised in the mind of a reasonable and intelligent man, fully apprised on the circumstances, that an appointee might well be swayed by bias, albeit unconscious, then such appointment should be set aside." (les mots soulignés sont de nous). Il poursuit et cite l'éminent auteur S.A. de Smith qui dit dans Judicial Review of Administrative Action, 1st ed. pp. 140-1:

"The emphasis has shifted from the simple precepts of the law of nature to the more subtle refinements of public policy. In order that public confidence in the administration of justice may be fully maintained, no man who is himself a party to proceedings or who has any direct pecuniary interest in the result is qualified at common law to adjudicate on those proceedings. If, however, it is alleged that the adjudicator... is to be suspected of partisanship ... the court will not hold him to be disqualified unless the circumstances point to a real likelihood of bias."

## et à la page 149:

"A'real likehood' of bias appears to mean a substantial possibility of bias. The court, it has been said, will judge of the matter "as a reasonable man would judge of any matter in the conduct of his own business."

"The test of real likelihood of bias which has been applied in a number of leading cases in magisterial and liquor licensing law is based on the reasonable apprehension of a reasonable man apprised of the facts. It is no doubt desirable that all Judges, like Caesar's wife, should be above suspicion."

Le docte juge cite plusieurs causes qui supportent ce point de vue.

Dans cette instance, l'allégation de partialité a été fondée sur deux déclarations faites par l'enquêteur spécial lors d'une pause-café: (selon le témoignage de Me Bélec).

- 1) "Lorsque les immigrants arrivent au pays, ils voudraient qu'on conforme nos habitudes de vie à la leur. Ils vivent 3 ou 4 familles dans une maison; ils ne dépensent pas; ils ont un bon compte de banque et après 4 ou 5 ans, ils ont une automobile, une maison. Moi, ça fait 25 ans que je travaille et ils ont le porte-feuille plus épais que le mien."
- 2) "Toutes les fois qu'il y a un Haltien qui vient au pays, on a des troubles avec."

However, the test of real likelihood of bias is objective "the reasonable apprehension of a reasonable man apprised of the facts" and a court cannot go so far as to consider witnesses' impressions of the tone of voice or facial expression of the person making the statement complained of. The Court can go no farther than to examine the words used to see if they would arouse a reasonable apprehension of bias in the mind of a reasonable man. Mr. St-Louis' remarks on the subject of immigrants generally cannot be said to arouse such a reasonable apprehension.

Moreover, the words used, even if accepted as an expression of hostility, are general in tenor. De Smith says (page 152) "General expressions of hostility towards a group to which a party belongs (e.g. poachers or motorists) do not disqualify". The learned author cites jurisprudence in support of this statement.

The second statement or remark by Mr. St-Louis is much more serious. In the Board's opinion it was of such a nature as to raise a real apprehension in the mind of a reasonable man that the Special Inquiry Officer was likely to be swayed by bias. De Smith qualifies his statement above quoted, as to general expression of hostility towards a group as follows: (page 152) "Where, however, an adjudicator expresses his general sentiments so vehemently as to make it likely that he will be incapable of dealing with an individual case in a judicial spirit... or where an arbitrator said that in his experience all persons of the nationality of one of the parties before him were untruthful witnesses (Re "Catalina" and "Norma") (1938) 6 Lt. L.R. 360 (actual bias shown) the Courts will hold him to be disqualified".

M. St-Louis, during an adjournment shortly after the commencement of an inquiry respecting a Haitian, expressed a sentiment or preconception respecting persons of Haitian nationality that can only lead to the irresistible conclusion that he was prejudiced against such persons to such an extent that he would be unable to act "judicially" in the inquiries respecting M. and Mme Janvier.

As noted above, M. Janvier was represented at the inquiry by able and experienced legal counsel, Me Bélec. At no time during the inquiry did Me Bélec object to Mr. St-Louis continuing as Special Inquiry Officer, nor was any objection made to his acting as Special Inquiry Officer on the inquiry respecting Mme Janvier. At the hearing of the appeals, Me Bélec did not raise the question of disqualification of the Special Inquiry Officer until after he had completed, or almost completed his submissions on the merits of the appeals. By failing to object the moment the likelihood of bias on the part of the Special Inquiry Officer came to his attention, did Me Bélec deprive himself of the right to raise this objection on appeal?.

In an interesting article "Disqualification on the ground of bias as applied to administrative tribunals" in (1945) 23 C.B.R. 453, the learned author, Robert M. Sedgewick Jr., states (at p. 458) "Where

La Commission estime que la première déclaration ne peut amener à soupçonner une vraissemblance raisonnable de partialité. En premier lieu, les mots rapportés comme ayant été utilisé peuvent être qualifiés de flatteurs plutôt qu'autrement. Il est vrai que Me Desrosiers a témoigné (page 16, audition du 27 juin 1969):

"De la façon dont cela a été dit, oui, je trouve que M. St-Louis avait l'air d'un homme frustré."

Toutefois le critère de vraisemblance de partialité est objectif: "the reasonable apprehension of a reasonable man apprised of the facts" et une cour ne peut aller jusqu'à considérer les impressions du témoin sur le ton de la voix ou l'expression du visage de la personne dont se plaint le témoin déclarant. La Cour s'arrête à l'examen des mots utilisés pour déterminer si ceux-ci éveilleraient dans l'esprit d'un bon père de famille une appréhension raisonnable de partialité. On ne peut pas dire que les remarques en général de M. St-Louis au sujet des immigrants font naître une telle appréhension raisonnable.

De plus, les mots utilisés, même s'ils sont acceptés comme une expression d'hostilité, sont pris dans un sens général. De Smith dit (page 152) "General expression of hostility towards a group to which a party belongs (e.g. poachers or motorists) do not disqualify". L'éminent auteur prend la jurisprudence au support de sa déclaration.

La seconde déclaration ou remarque de M. St-Louis est beaucoup plus sérieuse. La Commission estime qu'elle était de nature à faire naître une réelle appréhension de partialité dans l'esprit d'un homme raisonnable et à le faire penser que l'enquêteur spécial était vraisemblablement influencé par la partialité. De Smith qualifie sa déclaration, mentionnée plus haut, au sujet de l'expression générale d'hostilité envers un groupe ainsi: (page 152) 'Where, however, an adjudicator expresses his general sentiments so vehemently as to make it likely that he will be incapable of dealing with an individual case in a judicial spirit... or where an arbitrator said that in his experience all persons of the nationality of one of the parties before him were untruthful witnesses (Re "Catalina" and "Norma") (1938) 6Lt. L.R. 360 (actual bias shown) the Courts will hold him to be disqualified".

M. St-Louis, lors d'un ajournement, peu de temps après le début de l'enquête relative à un haftien, a exprimé un sentiment ou une idée préconçue au sujet des personnes de nationalité haftienne ce qui ne peut que conduire à la conclusion inéluctable qu'il était partial à l'endroit de telles personnes et ceci à un tel degré qu'il aurait été incapable d'agir de façon judiciaire ("judicially") aux enquêtes relatives à M. et Mme. Janvier.

Comme il a été noté plus haut, M. Janvier a été représenté à l'enquête par le compétent et expérimenté conseiller juridique Me Bélec

bias is alleged and the party is aware of it, he must take objection to the jurisdiction at the outset. If he raises no objection until after the hearing, the objection is waived, and cannot be raised thereafter (R. v. Steele, (1895) 26 O.R. 540, R. v Huggins (1895) 1 Q.B. 563, Re Hanlan 50 O.L.R. 20). This would appear to be a principle not in accordance with general law. We have seen that any decision rendered by a judge, who is disqualified from sitting because of bias, is void, a mere nullity. It is difficult to understand how a person by appearing and raising no objection, can be held to waive an objection, which would otherwise render the proceedings a nullity". In other words, does the existence of a real likelihood of bias automatically deprive the judicial officer of jurisdiction? If it does, failure to object when the bias is discovered cannot revest jurisdiction in the judicial officer, since consent cannot give jurisdiction.

Re Hanlan involved an application for an order of prohibition to two justices of the Peace, prohibiting them to proceed further to enforce an order made under the Deserted Wives Maintenance Act. One of the grounds of application was bias on the part of one of the Justices. Orde J. in dismissing the application, said at page 25: 'Whatever ground there may be for the contention that there was bias on the part of Brink, I think that Hanlan cannot now raise this objection. When bias is alleged and the party is aware of it, he must take objection to the Magistrate's jurisdiction at the outset. If he raises no objection until after the hearing the objection is waived, and cannot be raised afterwards. It is sufficient upon this point to refer to R. v Steele (supra) and R. v Huggins (supra)."

In R. v Steele a summary conviction for an infraction of the Fisheries Act was quashed on the ground that since the convicting justice was the son of the complainant, and the latter was entitled to one half of the penalty imposed, there was a likelihood of the existence of real bias, or at least a reasonable apprehension of bias. It appears from the report of this case that objection was taken before the justice to his adjudicating on the matter. In rendering judgment Meredith C.J. cited with approval R. v. Huggins (supra). He stated (p. 546-54): "... If a state of thing exists... which is likely to create a bias... in the magistrate, in favour of one of the parties or... which causes a reasonable apprehension of bias - that is sufficient to prevent his adjudication upon the matters in controversy being upheld, if it be impeached by a party who either had no knowledge of the existence of that state of things, or knowing of it, objected to the magistrate acting..." (italics mine).

In Halsbury Ed. 2, vol. XXI, p. 541, we find: "Allegations of bias should not be lightly made, but if any reasonable probable ground for alleging bias exists a justice should not act, but should withdraw from the bench during the hearing. The mere presence on the bench of an interested magistrate, whether he takes part in the hearing or not, renders the proceedings irregular and consequently voidable" (italics mine). The case cited by Halsbury in support of this last statement

lequel à aucun moment de l'enquête ne s'est pas opposé au fait que M. St-Louis continuait d'agir en qualité d'enquêteur spécial, non plus aucune objection n'a été soulevée quant au fait que M. St-Louis tenait l'enquête concernant Mme Janvier. A l'audition des appels, Me Bélec n'a soulevé la question de l'incompétence de l'enquêteur spécial, qu'après avoir terminé, ou presque, la présentation de ses arguments sur le fond des appels. En omettant de poser l'objection au moment où la vraisemblance de partialité de l'enquêteur spécial lui est apparue, est-ce que Me Bélec s'est privé du droit de soulever cette objection en appel?

Dans un article intéressant 'Disqualification on the ground of bias as applied to administrative tribunals" en (1945) 23 C.B.R. 453, le docte auteur, Robert M. Sedgewick Jr., déclare (à la page 458) 'Where bias is alleged and the party is aware of it, he must take objection to the jurisdiction at the outset. If he raises no objection until after the hearing, the objection is waived, and cannot be raised thereafter (R. v. Steele, (1895) 26 O.R. 540, R. v. Huggins (1895) 1 Q.B. 563, Re Hanlan 50 O.L.R. 20). This would appear to be a principle not in accordance with general law. We have seen that any decision rendered by a judge, who is disqualified from sitting because of bias, is void, a mere nullity. It is difficult to understand how a person by appearing and raising no objection, can be held to waive an objection, which would otherwise render the proceedings a nullity". En d'autres termes, l'existence d'une vraisemblance réelle de partialité enlève-t-elle automatiquement à un agent judiciaire sa compétence? Si oui, omettre de s'opposer quand la partialité apparaît ne peut redonner compétence à l'agent judiciaire, puisque l'assentiment ne peut donner compétence.

Re Hanlan concerne la demande d'une ordonnance de prohibition contre deux juges de paix, afin de leur interdire de continuer à procéder à l'exécution d'une ordonnance rendue sous le régime de la loi: the Deserted Wives Maintenance Act. Un des motifs de la requête était partialité de l'un des juges. Orde J. dans le rejet de la requête, a dit à la page 25: "Whatever ground there may be for the contention that there was bias on the part of Brink, I think that Hanlan cannot now raise this objection. When bias is alleged and the party is aware of it, he must take objection to the Magistrate's jurisdiction at the outset. If he raises no objection until after the hearing the objection is waived, and cannot be raised afterwards. It is sufficient upon this point to refer to R. v Steele (supra) and R. v Huggins (supra)."

Dans la cause R. c. Steele une condamnation par un juge de paix amenée par la violation de la Loi Fisheries Act a été annulée pour le motif suivant: puisque le juge était le fils du plaignant, et que ce dernier encourait la moitié de la penalité imposée, il y avait vraisemblance de l'existence de réelle partialité, ou tout au moins une appréhension raisonnable de partialité. Il semble d'après le rapport de cette cause que l'objection ait été amenée devant le juge de paix

goes farther than the circumstances outlined in the paragraph above quoted: R. v Galway Justices (1906) 2 I.R. 499. This is digested in the E & E Digest, vol. 33, page 342: "an order of acquittal made by a chairman and justices of quarter sessions (assuming one of the justices to have been biassed) cannot be quashed on certiorari. The order of a biassed tribunal is voidable only, not void."

In Re Thompson and Local Union 1026, International Union of Mine and Smelter Workers (1962) 35 D.L.R. 2d 333, a member of a Labour Board disqualified himself from sitting but remained in the room during the hearing. At one point he drew the Board's attention to one of the issues, but did not participate in the decision. No objection was taken to his intervention until after the decision was handed down. An application for prohibition and certiorari was dismissed. On appeal to the Manitoba court of Appeal, Freedman J.A. in rendering the majority judgment, found that the member's intervention did not involve him as a participating member in the Board's decision, and that decision could not be impugned for want of jurisdiction, as having been made by a tribunal one of whose members was disqualified on account of bias. The failure to object at the time of the intervention was moreover fatal to the application: "Nor was any objection taken at the time of Mr. Janis' intervention as already mentioned. The jurisdiction of the Board was, with full knowledge of all the facts, accepted and acknowledged by Mine-Mill. Had the Board's decision been favourable to it Mine-Mill would never have questioned its jurisdiction to make it. It should not now be permitted to challenge that jurisdiction now that the decision is adverse". (page 340) Monnin J.A., dissenting, found that the member was disqualified and that his disqualification disqualified all the members of the Board. Since the Board was disqualified ab initio "it was without jurisdiction to proceed with the hearing and no amount of acquiescence or continuation with the proceedings... can confer jurisdiction on a Board that is without jurisdiction ab initio." (page 345).

This dissenting opinion would seem to flow from a factual interpretation: that the disqualification of one member at the beginning of the proceedings disqualified the whole board so as to render the proceedings void ab initio. It does not appear to deal with the question of bias  $\underline{\text{per se}}$ .

In Int. Union of Mine etc. Workers v United Steel Workers, (1964) 48 W.W.R. 15, the B.C. Court of Appeal allowed an appeal from a dismissal of application for certiorari to quash a direction of the Labour Relations Board. A member who had disqualified himself sat with the Board but took no part in its deliverations. This was objected to during the course of the hearing by the Board. The Court of Appeal held that the presence of the member was a "grave impropriety" and the direction of the Board was quashed.

In Reg. v Ontario Labour Relations Board, Ex parte Hall, (1963) 2 O.R. 239, an order of prohibition was granted on the ground of a reasonable likelihood of bias on the part of a member of a Labour Relations Board. On application for certification to the Board, counsel for the

afin qu'il arbitre en cette matière. Meredith C.J. en rendant son jugement a cité et a approuvé R. v Huggins (supra). Il a déclaré (p. 546-54): "... If a state of thing exists ... which is likely to create a bias ... in the magistrate, in favour of one of the parties or ... which causes a reasonable apprehension of bias - that is sufficient to prevent his adjudication upon the matters in controversy being upheld, if it be impeached by a party who either had no knowledge of the existence of that state of things, or knowing of it, objected to the magistrate acting..." (les soulignés sont de nous).

Dans Halsbury Ed. 2, vol. XXI, p. 541, nous trouvons:
"Allegations of bias should not be lightly made, but if any reasonable probably ground for alleging bias exists a justice should not act, but should withdraw from the bench during the hearing. The mere presence on the bench of an interested magistrate, whether he takes part in the hearing or not, renders the proceedings irregular and consequently voidable" (les soulignés sont de nous). La cause citée par Halsbury au support de sa dernière déclaration va plus loin que les circonstances décrites dans le paragraphe cité ci-dessus: R. v. Galway Justices (1906) 2 I.R. 499. Ceci est résumé dans the E & E Digest, vol. 33, page 342: "an order of acquittal made by a chairman and justices of quarter sessions (assuming one of the justices to have been biassed) cannot be quashed on certiorari. The order of a biassed tribunal is voidable only, not void."

Dans l'affaire Re Thompson and Local Union 1026, International Union of Mine and Smelter Workers (1962) 35 D.L.R. 2d 333, un membre de la Commission du Travail s'est rendu incompétent pour sièger mais il est resté dans la salle durant l'audience. À un moment, il a attiré l'attention de la Commission sur l'un des litiges, mais il n'a pas participé à l'élaboration de la décision. Durant l'audience aucune objection n'a été faite quant à son intervention, jusqu'au moment où la décision a été rendue. La demande de bref de prohibition et de certiorari a été rejetée. L'affaire fut portée en appel à la cour du Manitoba; Freedman J.A., en rendant le jugement majoritaire, a déclaré que l'intervention du membre ne l'impliquait pas en tant que membre élaborant la décision de la Commission, et que la décision ne pouvait être récusée pour défaut de compétence, comme ayant été prise par un tribunal dont l'un des membres est devenu incompétent pour partialité. L'omission de faire objection au moment de l'intervention a été fatale à la demande: ''Nor was any objection taken at the time of Mr. Janis' intervention as already mentioned. The jurisdiction of the Board was, with full knowledge of all the facts, accepted and acknowledged by Mine-Mill. Had the Board's decision been favourable to it Mine-Mill would never have questioned its jurisdiction to make it. It should not now be permitted to challenge that jurisdiction now that the decision is adverse." (page 340) Monnin J.A. dissident a déclaré que le membre était incompétent et que son incompétence entraînait celle de tous les autres membres de la Commission. Puisque la Commission était

Union objected to the presence of the member on the Board, the Board withdrew to consider the matter and on its return the member stated he was not prepared to disqualify himself. Counsel for the Union then advised the Board that he would seek instructions to institute proceedings by way of prohibition, and withdrew "to prevent any suggestion that he had acquiesced" in the members' participation in the hearing.

In Re Elliott, Re R. v Jackson, (1959) 29 W.W.R. 579 (Sask. S.C.) prohibition was granted to prohibit a Police Magistrate from presiding at preliminary hearings involving Jackson. The writ was granted on the ground that the Magistrate had shown an element of bias on the application for bail and had consequently "lost his jurisdiction" to proceed with the preliminary inquiries. The application for the writ was apparently brought as soon as the bail had been set.

In R. v McLatchy, Ex p. Antinori Fishing Club (1916) 44 NBR 402, a country court judge made an order of review setting aside a judgment of a magistrate in favour of an assessment made by a fishing club in respect of one of its members. An application for certiorari to quash this order of review was denied by the appeal division.

Grimmer J. stated, p. 404 "In my opinion there is no want or excess of jurisdiction arising in the case, or such gross miscarriage of justice as warrants any interference on the part of this Court." And at page 405: "There is also another reason in my opinion why the rule should be discharged. On the trial at the conclusion of the plaintiff's case, counsel for the defendant took objection to the magistrate's jurisdiction on the ground that he had been a shareholder in the plaintiff's club... The objection was however over-ruled and judgment given for the plaintiff."

In R. v McMongagle, Ex p. Plummer, (1931) MPR 543, Plummer was charged with an offence under the Illegitimate Children's Act, and a warrant for his arrest was issued. He consulted McMonagle, who declined to act as he would be sitting as a judge in the cause, but referred Plummer to his law partner, who did act for him on the preliminary examination before McMonagle, at which Plummer was committed for trial. An order for writ of certiorari was obtained, but was set aside by the Supreme Court of New Brunswick, on the ground that certiorari was not the proper remedy under the circumstances of this case. Baxter JJ, however, stated p. 547 (after holding that there was no doubt that Plummer knew of the partnership between McMonagle and his own counsel): "Were this a case of a conviction made by a magistrate there is no doubt that ... such conviction could not be allowed to stand if objection had been taken ... The practice of the Court requires that in cases of conviction by magistrates or orders made by them that it is necessary for the application to satisfy the Court that he had no knowledge of the point at the time when it might have been raised."

incompétente <u>ab initio</u> "it was without jurisdiction to proceed with the hearing and no amount of acquiescence or continuation with the proceedings... can confer jurisdiction on a Board that is without jurisdiction <u>ab initio</u>." (page 345).

L'opinion dissidente semblerait découler d'une interprétation de fait: au début d'une procédure l'incompétence d'un membre rend incompétent l'ensemble de la Commission tant et si bien que l'incompétence rend les procédures non-avenues <u>ab initio</u>. Ceci ne semble pas traiter de la question de partialité <u>per se</u>.

Dans la cause Int. Union of Mine etc. Workers c. United Steel Workers. (1964) 48 W.W.R. 15, la cour d'appel de Colombie-Britannique a accueilli l'appel d'un rejet d'une demande de certiorari pour annuler une ordonnance du Labour Relations Board. Un membre qui s'est rendu incompétent, a siégé à la Commission, mais n'a pas pris part à ses délibérations. Cette objection a été faite pendant l'audition de l'appel par la Commission. La Cour d'appel a soutenu que la présence du membre constituait une "grave impropriety" et l'ordonnance de la Commission a été annulée.

Dans la cause Reg. c Ontario Labour Relations Board, Ex parte Hall, (1936) 2 O.R. 239, pour une vraisemblance raisonnable de partialité de l'un des membres de Labour Relations Board, une ordonnance de bref de prohibition a été accordée. Sur la demande de certification à la Commission, le conseiller de l'Union a fait une objection relative à la présence d'un membre de la Commission, la Commission s'est retirée pour débattre le point et à la reprise de la séance le membre a déclaré qu'il n'était pas disposé à se rendre incompétent. Le conseil de l'Union a ensuite prévenu la Commission qu'il prendrait des mesures pour intenter une action par bref de prohibition, et il s'est retiré "to prevent any suggestion that he had acquiesced" à la participation des membres de l'audience.

Dans la cause Re Elliott, Re R. c Jackson, (1959) 29 W.W.R. 579 (Sask. S.C.) un bref de prohibition a été accordé afin d'interdire à un juge de tribunal de simple police (Police Magistrate) de présider aux audiences préliminaires concernant Jackson. Le motif qui a amené l'octroi du bref est le suivant: le juge lors de la demande de cautionnement, a montré la partialité et en conséquence "lost his jurisdiction" de procéder aux enquêtes préliminaires. Apparemment la demande de bref a été soumise aussitôt que la caution a été fixée.

Dans la cause R. c McLatchy, Ex p. Antinori Fishing Club (1916) 44 NBR 402, un juge d'une cour de comté a rendu une ordonnance de révision cassant le jugement rendu par un magistrat en faveur de l'évaluation faite par un club de pêche, quant à l'un de ses membres. Une demande de bref de certiorari pour annuler cette ordonnance de révision a été déboutée par la division d'appel.

In Endike v Steed (1678) 1 Freem. K.B. 294, 89 E.R. 213, prohibition was sought after verdict and judgment on the ground of want of territorial jurisdiction of the court pronouncing it. The Court refused to grant prohibition, on the ground that the party asking for it was too late. It agreed with Maynard, who argued against the writ, and who is reported to have said "where it appears in the declaration... that the Court hath no jurisdiction, there a prohibition may be granted at any time... but when, by reason of some circumstance of time or place, the Court hath no jurisdiction, there the party ought to plead it, or else he shall not have advantage of it."

In Langlois v Levesque, (1951) B.R. 669 the Quebec Queen's bench dismissed an appeal from a judgment of the Superior Court granting an inscription en droit totale in respect of a writ of prohibition. The writ was obtained against a judge holding an inquiry pursuant to the Act respecting Bribery and Corruption in Municipal matters R.S.Q. 1941, C 214, on the grounds of bias. In rendering the judgment of the Court of Queen's Bench, Bissonnette J. stated (page 672):

"Considérant que les moyens invoqués par les appelants et tirés de la partialité, du préjugé, du favoritisme, etc., même s'ils étaient prouvés, n'affectent aucunement la jurisdiction qu'avait le juge tant ratione materiae que ratione personae, ne le dépouillent pas de la compétence qui lui est attribuée par la loi en général et par cette loi particulière et qu'également toutes ces allégations, fussent-elles établies, ne constituent pas de leur nature un excès de juridiction;

Considérant en effet que la juridiction du juge s'apprécie selon la nature, l'objet et l'effet de l'ordre ou de l'ordonnance ou du jugement qu'il rend, sans égard aux intentions ni aux sentiments qui peuvent animer celui qui les signe; que si ce juge est compétent quant à la manière et quant à la personne, il demeure investi, en dépit de toutes autres contingences de l'autorité judiciaire que la loi attribue à ses fonctions; que toute prévarication de sa part, si jamais elle existe, ressortit d'un autre domaine et ne tarit pas sa juridiction;"

## and at page 674:

"Considérant que les allégations de la requête pour l'émission du bref de prohibition, même si elles sont tenues pour vraies, sont insuffisantes en droit pour établir que le juge a agi sans juridiction ou qu'il a excédé celle qu'il avait mission d'exercer;"

De Smith, in line with Halsbury, states (Judicial Review of Administrative Action, p. 162) "Adjudication by one who is disqualified at common law for interest or likelihood of bias makes the proceedings

Le juge Grimmer a déclaré, p. 404: "In my opinion there is no want or excess of jurisdiction arising in the case, or such gross miscarriage of justice as warrants any interference on the part of this Court." Et à la page 405: "There is also another reason in my opinion why the rule should be discharged. On the trial at the conclusion of the plaintiff's case, counsel for the defendent took objection to the magistrate's jurisdiction on the ground that he had been a shareholder in the plaintiff's club ... The objection was however over-ruled and judgment given for the plaintiff."

Dans la cause R. c McMonagle, Ex p. Plummer, (1931) MPR 543, Plummer a été condamné pour avoir violé la loi: Illegitimate Children's Act, et un mandat d'arrestation a été émis contre lui. Il a consulté McMonagle, qui a refusé d'être son conseiller puisqu'il siègerait à la cour en qualité de juge dans cette affaire, mais il a envoyé Plummer à son associé, qui l'avait conseillé au cours de l'interrogatoire préliminaire devant McMonagle (interrogatoire de mise en accusation de Plummer). Une ordonnance de bref de certiorari a été obtenue, mais a été cassée par la Cour Suprême du Nouveau-Brunswick qui a donné pour motif que le bref de certiorari n'était pas le moyen approprié aux circonstances de cette affaire. Baxter J.J., toutefois, a déclaré p. 547 (après avoir soutenu que Plummer connaissait sans aucun doute le lien existant entre McMonagle et son propre conseiller): 'Were this a case of a conviction made by a magistrate there is no doubt that ... such conviction could not be allowed to stand if objection had been taken ... The practice of the Court requires that in cases of conviction by magistrates or orders made by them that it is necessary for the applicant to satisfy the Court that he had no knowledge of the point at the time when it might have been raised."

Dans la cause Endike c Steed (1678) 1 Freem. K.B. 294, 89 E.R. 213, un bref de prohibition a été demandé contre le verdict et le jugement en raison du manque de compétence en ce territoire (territorial jurisdiction) de la cour qui l'a rendu. La cour a refusé d'accorder le bref de prohibition, en donnant pour motif que la partie requérante a soumis sa demande trop tard. Elle a été d'accord avec Maynard, qui a plaidé contre le bref et qui aurait dit "where it appears in the declaration ... that the Court hath no jurisdiction, there a prohibition may be granted at any time ... but when, by reason of some circumstance of time or place, the Court hath no jurisdiction, there the party ought to plead it, or else he shall not have advantage of it."

Dans la cause Langlois c Levesque, (1951) B.R. 669 le Banc de la Reine a rejeté un appel d'un jugement de la Cour Suprême accordant une inscription en droit totale quant à un bref de prohibition. Ce bref a été obtenu contre un juge qui tenait une enquête conformément à la loi sur la fraude et la corruption dans les affaires municipales S.R.Q. 1941, C 214. En rendant le jugement de la Cour du Banc de la Reine, le juge Bissonnette a déclaré: (page 672):

voidable, not void". The learned author suggests that the reason for this view is historical. "Before the writ of error was abolished, a complaint that a judge was disqualified for pecuniary interest was assignable as error in fact; and error made a decision voidable not void". He goes on: "If, therefore, the tribunal is statutory, the proper method of attaching its decision is ... by applying for certiorari to quash ... Moreover, because the disqualifications do not of themselves render the decisions a nullity, a party may waive his objection to them. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if ... the party affected was prevented by surprise from taking the objection at the proper time ..."

The prerogative writs of certiorari and prohibition have been used for many years as a method of judicial control over administrative tribunals where no other remedy exists. Judicial review pursuant to these writs is rather loosely thought to be restricted to the exercise of jurisdiction by the inferior tribunal. It would appear that certiorari may be granted, not only for absolute want of jurisdiction, but also if the inferior tribunal failed to observe the rules of natural justice, e.g. was biassed, or acted in bad faith, or misconceived the scope of its discretionary powers (see de Smith page 15). Jowitt, in his definition of certiorari, says that the superior court may quash the decision of an inferior tribunal "for want of jurisdiction, breach of the rules of natural justice (e.g. by bias) or error on the face of a 'speaking order'". On the other hand, he defines prohibition as "an order issuing out of the High Court to restrain an inferior court within the limits of its jurisdiction... Where a want of jurisdiction is apparent on the face of the proceedings in an inferior court, the High Court is bound to grant a prohibition, although the applicant has acquiesced in the proceedings of the inferior court (Farquarson v Morgan (1894) 1 Q.B. 552)..." It would appear however that if want of jurisdiction does not appear on the face of the proceedings, the grant of the remedy of prohibition is discretionary.

A study of the cases above summarized - and many others, indicates that bias or the reasonable likelihood thereof does not automatically deprive an inferior tribunal of jurisdiction. It may lose its jurisdiction if objection is brought as soon as the bias is known, and then certiorari, and possibly prohibition, would lie. In the instant case, had Me Bélec objected to the continuation of the inquiry by M. St-Louis as soon as the likelihood of bias on the part of that gentleman came to his attention, he might have obtained a writ of prohibition and certainly would have obtained a writ of certiorari.

The Board's jurisdiction derives from an appeal, and there is no question of prerogative writs before this Court. The principle, however, remains the same: Where an appellant is represented by legal counsel at an inquiry, and a reasonable likelihood of bias on the part

"Considérent que les moyens invoqués par les appelants et tirés de la partialité, du préjugé, du favoritisme, etc., même s'ils étaient prouvés, n'affectent aucunement la jurisdiction qu'avait le juge tant ratione materiae que ratione personae, ne le dépouillent pas de la compétence qui lui est attribuée par la loi en général et par cette loi particulière et qu'également toutes ces allégations, fussent-elles établies, ne constituent pas de leur nature un excès de juridiction;

Considérant en effet que la juridiction du juge s'apprécie selon la nature, l'objet et l'effet de l'ordre ou de l'ordonnance ou du jugement qu'il rend, sans égard aux intentions ni aux sentiments qui peuvent animer celui qui les signe; que si ce juge est compétent quant à la manière et quant à la personne, il demeure investi, en dépit de toutes autres contingences, de l'autorité judiciaire que la loi attribue à ses fonctions; que toute prévarication de sa part, si jamais elle existe, ressortit d'un autre domaine et ne tarit pas sa juridiction;"

## et à la page 674:

"Considérant que les allégations de la requête pour l'émission du bref de prohibition, même si elles sont tenues pour vraies, sont insuffisantes en droit pour établir que le juge a agi sans juridiction, ou qu'il a excédé celle qu'il avait mission d'exercer;"

De Smith, dans la même ligne de pensée que Halsbury déclare (Judicial Review of Administrative Action, p. 162) "Adjudication by one who is disqualified at common law for interest or likelihood of bias makes the proceedings voidable, not void". Le docte auteur suggère que la raison au soutien de ce point est historique. "Before the writ of error was abolished, a complaint that a judge was disqualified for pecuniary interest was assignable as error in fact; and error made a decision voidable not void". Il continue: "If, therefore, the tribunal is statutory, the proper method of attaching its decision is ... by applying for certiorari to quash ... Moreover, because the disqualifications do not of themselves render the decisions a nullity. a party may waive his objection to them. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if ... the party affected was prevented by surprise from taking the objection at the proper time ..."

Les brefs de prérogative de certiorari et de prohibition ont été utilisés pendant longtemps comme méthode de contrôle judiciaire sur les tribunaux administratifs lorsque aucun autre moyen existait.

of the Special Inquiry Officer becomes evident to such counsel in the course of the inquiry - as in the present case - objection must be taken at the inquiry, and not raised for the first time on appeal. Failure to make such an objection amounts to submission to the jurisdiction of the Special Inquiry Officer, and unless there is evidence of actual prejudice suffered by the appellant which would amount to a denial of natural justice, such failure to object is fatal to the appellant's case.

In the instant appeal, it is evident on the face of the record that the appellant did suffer actual prejudice, if not from the bias of the Special Inquiry Officer, then from his failure to conduct a full and proper inquiry.

The inquiry respecting M. Janvier was largely directed to the question whether or not M. Janvier had taken employment without the written permission of an immigration officer. M. Janvier's viva voce evidence on this point is as follows: page 4, Minutes of inquiry, questioned by the Special Inquiry Officer:

- ''Q. Quel était le but de votre voyage chez nous?
  - R. C'est de venir étudier; je devais étudier et travailler ici et rester avec ma femme ...
- Q. Possédez-vous un billet de retour avec Air France pour votre pays?
- R. Oui.
- Q. Est-ce que vous l'avez avec vous?
- R. Non.
- 0. Où se trouve-t-il ce billet?
- R. Je l'ai échangé.
- Q. Pour quelle raison?
- R. J'avais besoin."

## and at page 9:

- "Q. Travaillez-vous depuis votre arrivée au Canada?
  - R. D'après moi, non.
- Q. Voulez-vous reconsidérer votre réponse ou si vous maintenez que vous n'avez pas travaillé depuis que vous êtes au Canada?
- R. D'après moi, je n'ai pas essayé aucun travail ici au Canada."

La révision judiciaire selon ces brefs est plutôt vague, bien que, non, restreinte à l'exercice de la juridiction d'un tribunal inférieur. Il semblerait que le bref de certiorari peut être accordé, non seulement pour manque absolu de juridiction, mais aussi si le tribunal inférieur n'a pas observé les lois de la justice naturelle, e.g. a été partial, ou a agi de mauvaise foi, ou a une conception erronée de la portée de ses pouvoirs discrétionnaires (voir de Smith page 15). Jowitt, dans sa définition de certiorari, dit que la cour supérieure peut réformer le jugement d'une cour inférieure "for want of jurisdiction, breach of the rules of natural justice (e.g. by bias) or error on the face of a 'speaking order'". Il définit, aussi, prohibition comme "an order issuing out of the High Court to restrain an inferior court within the limits of its jurisdiction ... Where a want of jurisdiction is apparent on the face of the proceedings in an inferior court, the High Court is bound to grant a prohibition, although the applicant has acquiesced in the proceedings of the inferior court (Farquarson v Morgan (1894) 1 Q.B. 552) ..." Il semblerait, toutefois que si le défaut de juridiction ne se manifeste pas à l'examen des procédures, l'octroi du moyen de prohibition est discrétionnaire.

Une étude des causes résumées supra - et beaucoup d'autres, montre que la partialité ou la vraisemblance raisonnable de partialité n'enlève pas automatiquement la juridiction d'un tribunal inférieur. Il peut perdre sa juridiction si l'objection est soulevée dès que la partialité est connue, et alors le bref de certiorari, et possiblement de prohibition, sont recevables. Dans la cause en instance, si Me Bélec s'était opposé au fait que M. St-Louis continuait l'enquête dès qu'une vraisemblance de partialité de la part de l'enquêteur a attiré son attention, il aurait pu obtenir un bref de prohibition et aurait obtenu certainement un bref de certiorari.

La Commission a juridiction en matière d'appel et il n'est pas question de brefs de prérogative devant cette cour. Toutefois le principe reste le même; lorsque à son enquête un appelant est représenté par un conseiller légal, et quand au cours de l'enquête une vraisemblance raisonnable de partialité de la part de l'enquêteur spécial devient évidente à ce conseiller - comme dans le cas présent - l'objection doit être posée à l'enquête et non soulevée pour la première fois en appel. Omettre de faire cette objection relative à la compétence de l'enquêteur spécial est fatale à la cause de l'appelant à moins qu'on ne prouve que l'appelant a souffert de préjudice réel duquel résulterait une dénégation de la justice naturelle.

Dans cette instance, le dossier manifeste que l'appelant a souffert de préjudice réel, si ce n'est à cause de la partialité de l'enquêteur spécial, alors de son incapacité de procéder à une enquête entière et régulière.

L'enquête relative à M. Janvier se centrait principalement sur la question de savoir si M. Janvier a accepté un emploi sans

The Special Inquiry Officer them introduced the alleged "Statutory declaration", quoted above, and stated:

"Nonobstant votre réponse, alors que je rendrai une décision dans votre cas je prendrai en considération le paragraphe 4 de la déclaration introduite au procès-verbal et connu sous le vocable pièce à l'appui "F". Permettez-moi de citer ce paragraphe à ce moment-ci. "Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada, et nous avons commencé à travailler pour le notaire Pierre Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968". Fin de la citation.

- Q. Comme je vous l'ai dit tout à l'heure, c'est ce paragraphe 4 que je considérerai lorsque je rendrai ma décision. Maintenant, dites-moi si vous avez l'autorisation d'un fonctionnaire du Ministère d'accepter de l'emploi au Canada?
- R. Du tout.

# PAR LA PERSONNE CONCERNÉE

Vous avez ma déclaration là, je l'avais signée mais je ne l'avais pas bien captée. J'ai dit en fait que j'ai un projet de travail chez monsier Desrosiers qui peut être d'une valeur de \$100.00 par mois mais en attendant qu'on me donne l'autorisation de travailler.

## PAR L'ENQUÊTEUR SPECIAL (à la personne concernée):

Pour votre propre protection, monsieur Janvier, permettezmoi de citer un article de la Loi sur l'Immigration à savoir l'article 50 (f)

- "sciemment fait une déclaration fausse ou trompeuse au cours d'un examen ou d'une enquête prévue par la présente loi ou à l'égard de l'admission d'une personne au Canada ou de la demande d'admission de qui que ce soit".
- Q. Maintenant, j'ai cité cet article de la Loi, ce n'est pas dans le but de vous menacer mais bien de vous faire comprendre les conséquences possibles d'une déclaration qui n'est pas tout à fait exacte ou erronée de votre part. Je n'ai aucune raison de douter que vous ayez travaillé depuis que vous êtes au Canada, j'ai même toutes les raisons de croire que vous avez effectivement travaillé. Ma question

l'autorisation d'un fonctionnaire du ministère. La preuve viva voce donnée par M. Janvier sur ce point est la suivante: page 4, procèsverbal de l'enquête, interrogé par l'enquêteur spécial:

- "Q. Quel était le but de votre voyage chez nous?
  - R. C'est de venir étudier; je devais étudier et travailler ici et rester avec ma femme...
- Q. Possédez-vous un billet de retour avec Air France pour votre pays?
- R. Oui.
- Q. Est-ce que vous l'avez avec vous?
- R. Non.
- Q. Où se trouve-t-il ce billet?
- R. Je l'ai échangé.
- Q. Pour quelle raison?
- R. J'avais besoin."

## et à la page 9:

- "Q. Travaillez-vous depuis votre arrivée au Canada?
  - R. D'après-moi, non.
- Q. Voulez-vous reconsidérer votre réponse ou si vous maintenez que vous n'avez pas travaillé depuis que vous êtes au Canada?
- R. D'après moi je n'ai pas essayé aucun travail ici au Canada."

L'enquêteur spécial a ensuite introduit la "déclaration statutaire" alléguée citée supra et a déclaré:

"Nonobstant votre réponse, alors que je rendrai une décision dans votre cas je prendrai en considération le paragraphe 4 de la déclaration introduite au procès-verbal et connu sous le vocable pièce à l'appui "F". Permettez-moi de citer ce paragraphe à ce moment-ci. "Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada, et nous avons commencé à travailler pour le notaire Pierre Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire

à cet égard, en autant que je sache, était claire et précise et il n'y avait pas d'ambigu¶té. Maintenant, à la lumière de ces raisons que je vous donne, pourriez-vous me dire si oui ou non la déclaration que vous avez faite à Hull le 3 mai 1968 est exacte?

- R. C'est pas définitivement exact.
- Q. Avez-vous fait une fausse déclaration?
- R. Parce que je ne pourrais pas penser que si je travaillais et je sais que je ne dois pas."

#### and at page 10:

- ''Q. Maintenant, je vous demanderais monsieur Janvier de m'éclairer un peu sur la dernière réponse que vous m'avez faite avant que j'ajourne cet avant-midi?
  - R. J'étais venu ici comme visiteur. Arrivé chez monsieur Desrosiers, pendant que je suis là je suis en train de faire des petits ouvrages à la maison, j'allais au chalet de Me Desrosiers, lorsque je ne fais rien je fais des petits ouvrages ici et là. J'ai fait ça par reconnaissance de ce qu'il a fait pour moi, c'est pas comme un emploi. Il me nourrit, j'habite chez lui, je ne peux pas rester sans rien faire, ça dépend des mois.
- Q. Receviez-vous au moment où la déclaration mentionnée précédemment a été complétée, \$100.00 par moi de Me Desrosiers?
- R. Oui.
- Q. Est-ce que vous recevez toujours \$100.00 par mois?
- R. Après il m'a donné \$50.00, \$25.00 comme emprunt.
- Q. Qu'est-ce que fait votre épouse présentement au Canada?
- R. Elle est comme moi ici, elle attend son papier pour pouvoir travailler.
- Q. A-t-elle déjà travaillé depuis qu'elle est au Canada?
- R. Elle est 1à, elle attend toujours.
- Q. Recevait-elle alors que la déclaration mentionnée précédemment a été faite, au mois de mai dernier, \$100.00 par mois de Me Desrosiers?
- R. Quinze jours.

et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968". Fin de la citation.

- Q. Comme je vous l'ai dit tout à l'heure, c'est ce paragraphe 4 que je considérerai lorsque je rendrai ma décision. Maintenant, dites-moi si vous avez l'autorisation d'un fonctionnaire du Ministère d'accepter de l'emploi au Canada?
- R. Du tout.

## PAR LA PERSONNE CONCERNÉE

Vous avez ma déclaration là, je l'avais signée mais je ne l'avais pas bien captée. J'ai dit en fait que j'ai un projet de travail chez monsieur Desrosiers qui peut être d'une valeur de \$100.00 par mois mais en attendant qu'on me donne l'autorisation de travailler.

## PAR L'ENQUÊTEUR SPÉCIAL (à la personne concernée):

Pour votre propre protection, monsieur Janvier, permettezmoi de citer un article de la Loi sur l'Immigration à savoir l'article 50(f)

"sciemment fait une déclaration fausse ou trompeuse au cours d'un examen ou d'une enquête prévue par la présente loi ou à l'égard de l'admission d'une personne au Canada ou de la demande d'admission de qui que ce soit".

- Q. Maintenant, j'ai cité cet article de la Loi, ce n'est pas dans le but de vous menacer mais bien de vous faire comprendre les conséquences possibles d'une déclaration qui n'est pas tout à fait exacte ou erronée de votre part. Je n'ai aucune raison de douter que vous ayez travaillé depuis que vous êtes au Canada, j'ai même toutes les raisons de croire que vous avez effectivement travaillé. Ma question à cet égard, en autant que je sache, était claire et précise et il n'y avait pas d'ambiguîté. Maintenant, à la lumière de ces raisons que je vous donne, pourriez-vous me dire si oui ou non la déclaration que vous avez faite à Hull le 3 mai 1968 est exacte?
- R. C'est pas définitivement exact.
- Q. Avez-vous fait une fausse déclaration?
- R. Parce que je ne pourrais pas penser que si je travaillais et je sais que je ne dois pas."

- Q. Ce n'est pas cela que je vous demande. Votre épouse recevait-elle \$100.00 par mois?
- R. Oui.
- Q. Est-ce que depuis que vous êtes au Canada vous avez fait parvenir des montants d'argent pour l'entretien de votre enfant en Hafti?
- R. C'est monsieur Desrosiers qui m'a fait des prêts.
- Q. Combien Me Desrosiers vous a-t-il prêté?
- R. \$300.00.
- Q. Êtes-vous tenu de rembourser cette somme? Si oui de quelle façon?
- R. J'allais lui rembourser au moment que j'allais commencer à travailler; par petits montants chaque mois. Chaque mois je pourrais lui donner \$25.00, etc.
- O. Avez-vous remboursé un certain montant sur ces \$300.00?
- R. Non, du tout.
- Q. Après votre arrivée à l'aéroport de Dorval où êtes-vous allé?
- R. Me Desrosiers est venu me chercher à l'aéroport et m'a amené directement chez lui.
- Q. Avez-vous habité chez Me Desrosiers continuellement depuis votre arrivée.
- R. Depuis mon arrivée.
- Q. Vous étiez attendu au Canada alors à ce moment-là?
- R. Oui.
- Q. Qui a payé votre passage pour venir au Canada?
- R. Me Desrosiers.
- Q. Et pour vous et pour votre épouse?
- R. Pour nous deux, exactement.
- Q. Etes-vous également tenu de rembourser le prix du passage au Canada?
- R. Oui.

## et à la page 10:

- "Q. Maintenant, je vous demanderais monsieur Janvier de m'éclairer un peu sur la dernière réponse que vous m'avez faite avant que j'ajourne cet avant-midi?
- R. J'étais venu ici comme visiteur. Arrivé chez monsieur Desrosiers, pendant que je suis là je suis en train de faire des petits ouvrages à la maison, j'allais au chalet de Me Desrosiers, lorsque je ne fais rien je fais des petits ouvrages ici et là. J'ai fait ça par reconnaissance de ce qu'il a fait pour moi, c'est pas comme un emploi. Il me nourrit, j'habite chez lui, je ne peux pas rester sans rien faire, ça dépend des mois.
- Q. Receviez-vous au moment où la déclaration mentionnée précédemment a été complétée, \$100.00 par mois de Me Desrosiers?
- R. Oui.
- Q. Est-ce que vous recevez toujours \$100.00 par mois?
- R. Après il m'a donné \$50.00, \$25.00 comme emprunt.
- Q. Qu'est-ce que fait votre épouse présentement au Canada?
- R. Elle est comme moi ici, elle attend son papier pour pouvoir travailler.
- Q. A-t-elle déjà travaillé depuis qu'elle est au Canada?
- R. Elle est là, elle attend toujours.
- Q. Recevait-elle alors que la déclaration mentionnée précédemment a été faite, au mois de mai dernier, \$100.00 par mois de Me Desrosiers?
- R. Quinze jours.
- Q. Ce n'est pas cela que je vous demande. Votre épouse recevait-elle \$100.00 par mois?
- R. Oui.
- Q. Est-ce que depuis que vous êtes au Canada vous avez fait parvenir des montants d'argent pour l'entretien de votre enfant en Ha?ti?
- R. C'est monsieur Desrosiers qui m'a fait des prêts.

- Q. Est-ce en plus des \$300.00 mentionnés précédemment?
- R. Oui.
- O. Vous devez combien en billet à Me Desrosiers?
- R. \$401.00, le ticket d'aller et retour.
- Q. De quelle façon vous étiez-vous proposé de rembourser cette somme?
- R. En commençant à travailler avec Me Desrosiers.
- Q. Mais nous avons établi tout à l'heure que vous n'aviez pas la permission de travailler au Canada. Alors comment pouvez-vous le rembourser à ce moment-là?
- R. J'avais l'intention de rembourser par tranches en travaillant pour Me Desrosiers.
- Q. Est-ce que ces sommes vous furent versées sans aucun engagement de votre part?
- R. Aucun engagement.
- Q. Il y a une réponse que vous m'avez faite ce matin qui en soi est très sérieuse en ce qu'elle met en doute l'honnêteté du fonctionnaire supérieur du bureau de Hull, monsieur Dubé. Votre réponse impliquait que monsieur Dubé aurait pris sur lui d'inscrire des choses dans cette déclaration avec lesquelles vous n'êtes pas ou n'étiez pas d'accord. Maintenant vous devez constater que c'est une accusation très grave et je serai très mal venu de laisser les choses où elles en sont. Il va de soi qu'il va falloir, monsieur Janvier, que vous me donniez beaucoup plus de précision avant que je ne puisse accepter votre témoignage de ce matin en rapport avec cette déclaration. Si, effectivement, vous pouvez me satisfaire que notre fonctionnaire ici a bel et bien falsifié cette déclaration, je serai obligé effectivement de le faire venir comme témoin?
- R. Je n'ai pas dit ça, j'ai dit qu'il a peut-être mal compris.
- Jusqu'à preuve du contraire, monsieur Janvier, je n'accepte pas votre réponse. Vous avez, vous et votre épouse, bel et bien signé cette déclaration. Donc c'était votre responsabilité à ce moment-là de voir à ce que le contenu soit exact ou autrement vous deviez refuser de signer cette déclaration, et comme j'ai dit ce matin, c'est sur ce document que je me baserai pour rendre ma décision dans votre cas car je ne peux pas accepter votre explication concernant le contenu de cette déclaration."

- Q. Combien Me Desrosiers vous a-t-il prêté?
- R. \$300.00.
- Q. Êtes-vous tenu de rembourser cette somme? Si oui de quelle façon?
- R. J'allais lui rembourser au moment que j'allais commencer à travailler; par petits montants chaque mois. Chaque mois je pourrais lui donner \$25.00, etc.
- Q. Avez-vous remboursé un certain montant sur ces \$300.00?
- R. Non, du tout.
- Q. Après votre arrivée à l'aéroport de Dorval où êtes-vous allé?
- R. Me Desrosiers est venu me chercher à l'aéroport et m'a amené directement chez lui.
- Q. Avez-vous habité chez Me Desrosiers continuellement depuis votre arrivée?
- R. Oui.
- Q. Qui a payé votre passage pour venir au Canada?
- R. Me Desrosiers.
- Q. Et pour vous et pour votre épouse?
- R. Pour nous deux, exactement.
- Q. Êtes -vous également tenu de rembouser le prix du passage au Canada?
- R. Oui.
- Q. Est-ce en plus des \$300.00 mentionnés précédemment?
- R. Oui.
- Q. Vous devez combien en billet à Me Desrosiers?
- R. \$401.00, le ticket d'aller et retour.
- Q. De quelle façon vous étiez-vous proposé de rembourser cette somme?

After some further questions, not relating to this point, Me Desrosiers, having retired as counsel, was called as a witness on behalf of M. Janvier. Questioned by the Special Inquiry Officer, he testified as follows: (p. 14 ff of the Minutes):

- ''Q. À quelle occasion avez-vous rencontré monsieur Janvier pour la première fois?
- R. J'ai rencontré monsieur Janvier à l'aéroport de Port-au-Prince à l'occasion d'un voyage au début d'avril 1968. Monsieur Janvier avait une voiture, il faisait du taxi."
- Q. Lors de ce voyage en Ha\u00e4ti lui avez-vous demand\u00e9 de venir au Canada pour visiter?
- Oui. Au cours des promenades qu'on faisait j'étais accompagné de monsieur Grégoire, un de mes amis à Hull. J'ai manifesté le désir de trouver et rencontrer des haftiens pour venir travailler pour moi au Canada et j'ai demandé à monsieur Janvier s'il connaissait des personnes qui seraient disponibles ... monsieur et madame Janvier étaient d'accord sur mon invitation de venir comme touristes au Canada, voir la localité si ca devait leur plaire et voir s'ils pourraient légaliser leur séjour d'une façon permanente et si oui, que je serais prêt à les prendre tous les deux à mon service. Son épouse pour s'occuper de la maison et monsieur Janvier j'aurais voulu qu'il m'accompagne un peu partout, qu'il s'occupe de ma voiture, à mon bureau qu'il agisse un peu comme commissionnaire, qu'il aille à la banque, au Palais de Justice, Caisse Populaire et dans tous bureaux de notaires et avocats, et voir à l'entretien du terrain, je pourrais lui trouver de l'ouvrage pour l'occuper lui et son épouse. C'est ce qui est arrivé, on a fait les arrangement là-bas pour qu'ils puissent obtenir les documents pour sortir d'Hafti; son passeport, billets d'avion, et je suis revenu. Et monsieur Janvier et sa femme, leurs affaires régularisées, pour sortir d'Hafti, sont venus au Canada. Je suis allé les rencontrer à Dorval, je les ai ramenés à Hull; ils sont demeurés à ma résidence depuis leur arrivée le 23 avril 1968 au matin. Je les loge, les nourrit, l'été on a passé la plus grande partie au chalet - deux mois. Alors je les ai pris sous ma tutelle et ils me suivent partout.
- Q. Avez-vous versé un montant par mois à titre de salaire à monsieur Janvier?
- R. Non, c'était bien entendu que tant qu'il n'aurait pas la permission du Ministère de travailler, que je les prenne sous mes soins, et l'argent que je leur avançais pour leurs besoins personnels et l'argent que j'ai avancé pour leurs billets de voyage aussi qu'effectivement s'ils demeuraient à mon service que ça allait être intégralement remboursé.

- R. En commençant à travailler avec Me Desrosiers.
- Q. Mais nous avons établi tout à l'heure que vous n'aviez pas la permission de travailler au Canada. Alors comment pouvez-vous le rembourser à ce moment-là?
- R. J'avais l'intention de rembourser par tranches en travaillant pour Me Desrosiers.
- Q. Est-ce que ces sommes vous furent versées sans aucun engagement de votre part?
- R. Aucun engagement.
- Q. Il y a une réponse que vous m'avez faite ce matin qui en soi est très sérieuse en ce qu'elle met en doute l'honnêteté du fonctionnaire supérieur du bureau de Hull, monsieur Dubé. Votre réponse impliquait que monsieur Dubé aurait pris sur lui d'inscrire des choses dans cette déclaration avec lesquelles vous n'êtes pas ou n'étiez pas d'accord. Maintenant vous devez constater que c'est une accusation très grave et je serai très mal venu de laisser les choses où elles en sont. Il va de soi qu'il va falloir, monsieur Janvier, que vous me donniez beaucoup plus de précision avant que je ne puisse accepter votre témoignage ce matin en rapport avec cette déclaration. Si, effectivement, vous pouvez me satisfaire que notre fonctionnaire ici a bel et bien falsifié cette déclaration, je serai obligé effectivement de le faire venir comme témoin?
- R. Je n'ai pas dit ça, j'ai dit qu'il a peut-être mal compris.
- Jusqu'à preuve du contraire, monsieur Janvier, je n'accepte pas votre réponse. Vous avez, vous et votre épouse, bel et bien signé cette déclaration. Donc c'était votre responsabilité à ce moment-là de voir à ce que le contenu soit exact ou autrement vous deviez refuser de signer cette déclaration, et comme j'ai dit ce matin, c'est sur ce document que je me baserai pour rendre ma décision dans votre cas car je ne peux pas accepter votre explication concernant le contenu de cette déclaration."

Après quelques questions supplémentaires, sans relations avec ce point, Me Desrosiers s'étant retiré comme conseiller, a été appelé comme témoin de M. Janvier. Interrogé par l'enquêteur spécial il a témoigné ceci: (p. 14 et suivantes du procès-verbal):

"Q. À quelle occasion avez-vous rencontré monsieur Janvier pour la première fois?

- Q. Avez-vous avancé des sommes d'argent à monsieur Janvier depuis le 22 avril 1968?
- Oui. Au début monsieur Janvier m'a dit qu'il avait besoin d'argent pour envoyer en Hafti alors il m'a remis ses billets d'avion et je lui ai avancé \$100.00 sur chaque billet d'avion. En fait, les billets d'avion je les ai en ma possession; monsieur Janvier me les a remis pour que je les remette à la Compagnie qui peut en avoir besoin mais je les ai conservés et je lui ai remis l'argent. Je n'ai jamais dit à monsieur Janvier que j'avais conservé ses billets. Ce n'était pas son problème en plus de ça il m'a demandé pour payer des dettes en Hafti, \$50.00 un moment donné et un peu plus tard \$25.00. Je lui ai demandé quelles étaient ses obligations en Halti pour lui et sa femme alors il m'a expliqué qu'il avait des paiements sur une automobile; il paye la moitié du loyer rue Fouchard et son père paye l'autre moitié et il doit payer un montant de \$30.00 par mois pour la personne qui s'occupe de sa fille et les paiements en leur absence. Ayant établi ses obligations mensuelles je lui ai dit que je lui prêterais environ ce qu'il lui faut pour envoyer en Halti et quelques dollars supplémentaires pour ses petits frais personnels. Et un autre jour je lui ai avancé sous forme de prêt \$75.00 à trois reprises plus \$50.00 et \$25.00 plus \$100.00 initial compris les frais, environ \$325.00.
- Q. Avez-vous avancé d'autres argents pour habillement ou choses semblables?
- R. Non, je lui ai acheté des souliers, etc.
- Q. Durant le jour chez vous pourriez-vous nous dire qu'est-ce que doit faire monsieur Janvier?
- R. Il est absolument libre de faire ce qu'il veut. Il n'a aucune obligation à mon égard.
- Q. Avez-vous exigé ou demandé à monsieur Janvier de faire un travail particulier depuis qu'il est ici?
- R. Non.
- Q. Vous a-t-il rendu des services quelconques?
- R. Oui.
- Q. Voulez-vous me décrire ses services depuis avril 1968?
- R. Il lave l'automobile, va tondre le gazon, va au magasin faire l'épicerie, à mon chalet il fait des petits ouvrages

- R. J'ai rencontré monsieur Janvier à l'aéroport de Port-au-Prince à l'occasion d'un voyage au début d'avril 1968. Monsieur Janvier avait une voiture, il faisait du taxi."
- Q. Lors de ce voyage en Hafti lui avez-vous demandé de venir au Canada pour visiter?
- Au cours des promenades qu'on faisait j'étais accompagné de monsieur Grégoire, un de mes amis à Hull. J'ai manifesté le désir de trouver et rencontrer des haftiens pour venir travailler pour moi au Canada et j'ai demandé à monsieur Janvier s'il connaissait des personnes qui seraient disponibles... monsieur et madame Janvier étaient d'accord sur mon invitation de venir comme touristes au Canada, voir la localité si ça devait leur plaire et voir s'ils pourraient légaliser leur séjour d'une facon permanente et si oui, que je serais prêt à les prendre tous les deux à mon service. Son épouse pour s'occuper de la maison et monsieur Janvier j'aurais voulu qu'il m'accompagne un peu partout, qu'il s'occupe de ma voiture, à mon bureau qu'il agisse un peu comme commissionnaire, qu'il aille à la banque, au Palais de Justice, Caisse Populaire et dans tous bureaux de notaires et avocats, et voir à l'entretien du terrain, je pourrais lui trouver de l'ouvrage pour l'occuper lui et son épouse. C'est ce qui est arrivé, on a fait les arrangments là-bas pour qu'ils puissent obtenir les documents pour sortir d'Hafti; son passeport, billets d'avion, et je suis revenu. Et monsieur Janiver et sa femmes, leurs affaires régularisées, pour sortir d'Hatti, sont venus au Canada. Je suis allé les rencontrer à Dorval, je les ai ramenés à Hull; ils sont demeurés à ma résidence depuis leur arrivée le 23 avril 1968 au matin, Je les loge, les nourrit, l'été on a passé la plus grande partie au chalet - deux mois. Alors je les ai pris sous ma tutelle et ils me suivent partout.
- Q. Avez-vous versé un montant par mois à titre de salaire à monsieur Janvier?
- R. Non, c'était bien entendu que tant qu'il n'aurait pas la permission du Ministère de travailler, que je les prenne sous mes soins, et l'argent que je leur avançais pour leurs besoins personnels et l'argent que j'ai avancé pour leurs billets de voyage aussi qu'effectivement s'ils demeuraient à mon service que ça allait être intégralement remboursé.
- Q. Avez-vous avancé des sommes d'argent à monsieur Janvier depuis le 22 avril 1968?
- R. Oui. Au début monsieur Janvier m'a dit qu'il avait besoin d'argent pour envoyer en Hafiti alors il m'a remis ses billets

autour de la maison. Je suis assez pris, sauf pour l'instant, par la chambre des notaires. Je prends beaucoup de repas en dehors, je dine et soupe fréquemment en dehors."

- Q. Lorsque vous avez demandé à monsieur Janvier de venir vous visiter au Canada était-il entendu qu'il serait à votre emploi?
- R. Oui dès qu'on lui permettrait un séjour permanent ou même l'autorisation comme citoyen canadien. À ce moment-là je ne connaissais pas les formalités; je lui ai promis que si ça faisait son affaire et que si ça faisait aussi la mienne; si on pouvait s'entendre que je le prendrais à mon service."

## At page 17 ff:

- "Q. Depuis que vous avez reçu monsieur Janvier chez vous a-t-il exécuté pour vous quelques travaux manuels ou de surveillance?
  - R. Qu'est-ce que vous entendez exactement par travail manuel.

    Laver l'automobile, couper le gazon. Quant je partais en
    voyage je n'étais pas pour le mettre dehors, je le laissais
    là tout seul, il n'était pas question qu'il m'accompagne à
    des congrès. Il n'a fait aucun travail de surveillance, les
    travaux manuels qu'il a faits c'était pour son bien personnel et comme passe-temps."

The Special Inquiry Officer then stated (at page 18):

"Sauf le respect que je vous dois je m'explique mal pourquoi vous faisiez venir des étrangers au Canada qui sont, à toute fin pratique, ou qui étaient du moins à ce moment-là, de parfaits étrangers pour vous. Evidemment, je comprends que nous n'avez à recevoir de personne de conseils en ce qui concerne vos largesses au point de vue financier, mais tout de même soyons spécifiques, il y a un intérêt de votre part. Vous vous attendez, bien évidemment, à ce que ces argents vous soient remboursés. De ceci, j'en déduis qu'effectivement ces gens-là alors qu'ils sont entrés chez nous au Canada c'était dans un but bien spécifique à savoir se rendre travailler chez nous. Il n'est pas question pour moi de jouer sur les mots, il n'est pas question non plus que je puisse questionner votre conduite, cela vous concerne."

Shortly thereafter the inquiry ended and the Special Inquiry Officer rendered his decision in respect of M. Janvier, that, among other things:

d'avion et je lui ai avancé \$100.00 sur chaque billet d'avion. En fait, les billets d'avion je les ai en ma possession; monsieur Janvier me les a remis pour que je les remette à la Compagnie qui peut en avoir besoin mais je les ai conservés et je lui ai remis l'argent. Je n'ai jamais dit à monsieur Janvier que j'avais conservé ses billets. Ce n'était pas son problème en plus de ça il m'a demandé pour payer des dettes en Hafti, \$50.00 un moment donné et un peu plus tard \$25.00. Je lui ai demandé quelles étaient ses obligations en Hafti pour lui et sa femme alors il m'a expliqué qu'il avait des paiements sur une automobile; il paye la moitié du loyer rue Fouchard et son père paye l'autre moitié et il doit payer un montant de \$30.00 par mois pour la personne qui s'occupe de sa fille et les paiements en leur absence. Ayant établi ses obligations mensuelles je lui ai dit que je lui prêterais environ ce qu'il lui faut pour envoyer en Hafti et quelques dollars supplémentaires pour ses petits frais personnels. Et un autre jour je lui ai avancé sous forme de prêt \$75.00 à trois reprises plus \$50.00 et \$25.00 plus \$100.00 initial compris les frais, environ \$325.00.

- Q. Avez-vous avancé d'autres argents pour habillement ou choses semblables?
- R. Non, je lui ai acheté des souliers, etc.
- Q. Durant le jour chez vous pourriez-vous nous dire qu'estce que doit faire monsieur Janvier?
- R. Il est absolument libre de faire ce qu'il veut. Il n'a aucune obligation à mon égard.
- Q. Avez-vous exigé ou demandé à monsieur Janvier de faire un travail particulier depuis qu'il est ici?
- R. Non.
- Q. Vous a-t-il rendu des services quelconques?
- R. Oui.
- Q. Voulez-vous me décrire ses services depuis avril 1968?
- R. Il lave l'automobile, va tondre le gazon, va au magasin faire l'épicerie, à mon chalet il fait des petits ouvrages autour de la maison. Je suis assez pris, sauf pour l'instant, par la chambre des notaires. Je prends beaucoup de repas en dehors, je dine et soupe fréquemment en dehors."
- Q. Lorsque vous avez demandé à monsieur Janvier de venir vous visiter au Canada était-il entendu qu'il serait à votre emploi?

"vous avez accepté un emploi au Canada sans l'autorisation d'un fonctionnaire du Ministère contrairement aux dispositions de l'alinéa (e) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'immigration."

It is clear from the Minutes of Inquiry that in reaching this decision the Special Inquiry Officer was greatly influenced by the statutory declaration made by M. Janvier on May 3, 1968, in particular paragraph 4 thereof:

"4. Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada, et nous avons commencé à travailler pour le notaire Pierre Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968."

This declaration is slightly defective as to form - a fact never objected to by Mes Bélec or Pharand at any stage in the proceedings. The jurat reads:

"déclaré devant moi à Hull, P.Q. ce 3<sup>e</sup> jour de mai, 1968, (signed) J.A.G. Dubé "Témoin - Fonctionnaire autorisé."

The Canada Evidence Act, R.S.C. 1952, c. 307 amended, s. 37 reads in part as follows:

- "37. Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or Dominion courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form following, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:
  - I, A.B., do solemnly declare that (state the fact or facts declared to) and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

Declared before me

R. Oui dès qu'on lui permettrait un séjour permanent ou même l'autorisation comme citoyen canadien. À ce moment-là je ne connaissais pas les formalités; je lui ai promis que si ça faisait son affaire et que si ça faisait aussi le mienne; si on pouvait s'entendre que je le prendrais à mon service."

## et à la page 17 et suivantes:

- "Q. Depuis que vous avez reçu monsieur Janvier chez vous a-t-il exécuté pour vous quelques travaux manuels ou de surveillance?
- R. Qu'est-ce que vous entendez exactement par travail manuel.
  Laver l'automobile, couper le gazon. Quand je partais en
  voyage je n'étais pas pour le mettre dehors, je le laissais
  là tout seul, il n'était pas question qu'il m'accompagne
  à des congrès. Il n'a fait aucun travail de surveillance,
  les travaux manuels qu'il a faits c'était pour son bien
  personnel et comme passe-temps."

#### L'enquêteur spécial a ensuite déclaré: (à la page 18):

"Sauf le respect que je vous dois je m'explique mal pourquoi vous faisiez venir des étrangers au Canada qui sont, à toute fin pratique, ou qui étaient du moins à ce moment-là, de parfaits étrangers pour vous. Evidemment, je comprends que vous n'avez à recevoir de personne de conseils en ce qui concerne vos largesses au point de vue financier, mais tout de même soyons spécifiques, il y a un intérêt de votre part. Vous vous attendez, bien évidemment, à ce que ces argents vous soient remboursés. De ceci, j'en déduis qu'effectivement ces gens-là alors qu'ils sont entrés chez nous au Canada c'était dans un but bien spécifique à savoir se rendre travailler chez nous. Il n'est pas question pour moi de jouer sur les mots, il n'est pas question non plus que je puisse questionner votre conduite, cela vous concerne."

Très peu de temps après cela l'enquête a pris fin et l'enquêteur spécial a rendu sa décision au sujet de M. Janvier. Cette décision dit entre autres choses:

"vous avez accepté un emploi au Canada sans l'autorisation d'un fonctionnaire du Ministère contrairement aux dispositions de l'alinéa (e) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'immigration."

D'après le procès-verbal de l'enquête il est clair que la déclaration statutaire faite par M. Janvier le 3 mai 1968 et en particulier à l'alinéa 4 de celle-ci a fortement influencé la décision de l'enquêteur spécial. L'alinéa 4 de la déclaration dit:

Section 19(4) of the Immigration Act reads:

"10(4) Every immigration officer has authority to administer oaths and take evidence under oath or by affirmation in any matter arising under this Act."

It is clear from evidence adduced at the inquiry that M. Dubé was an immigration officer. The statutory declaration complies in form with section 32 of the Canada Evidence Act, except that M. Dubé signed not only as "fonctionnaire autorisé" but also as "témoin". It must be held, however, that the statutory declaration complies substantially with section 37 of the Canada Evidence Act, and that the word "témoins" is of no significance and may be ignored as redundant. (See Phipson on Evidence, 10th Ed., p. 622).

The Board has frequently expressed the disapproval of excessive reliance by Special Inquiry Officers on statutory declarations made to an inquiry by the subject thereof without benefit of counsel and without being given an opportunity during the inquiry, to explain, expand, or repudiate the declaration. In the instant case, however, the Special Inquiry Officer, as he was entitled to do, cross-examined M. Janvier on this Declaration, particularly paragraph 4 thereof, and he also questioned Me Desrosiers, the alleged employer. It is clear that M. St-Louis did not believe M. Janvier's repudiation of paragraph 4 of the declaration and his denials that he had taken employment in Canada, nor did he believe Me Desrosiers' explanation of the arrangements between M. Janvier and himself.

The viva voce evidence adduced at the inquiry respecting M. Janvier, on the face of it, would seem to negate the existence of a contract of employment other than a contract conditional on among other things, the approval of the immigration authorities. In order for a person to have "taken employment" within the meaning of the Immigration Regulations, a contract of service, verbal or written, actual or implied, must be shown to exist.

On the other hand, paragraph 4 of the Declaration, standing alone, proves the existence of a contract of service between M. Janvier and Me Desrosiers, and actual implementation thereof before the Inquiry.

 $\,$  M. St-Louis accepted the facts as set out in the declaration and rejected the viva voce evidence contradicting or explaining the statements in the declaration.

Where credibility is the only issue, a Court of Appeal is extremely reluctant to overrule the decision of an inferior tribunal. But a study of the Minutes of inquiry respecting M. Janvier makes it clear that credibility cannot be said to be the only issue in the instant appeal.

"4. Que moi et mon épouse ne deviendrons pas à la charge du public canadien, car nous avons apporté le montant de \$200.00 au Canada, et nous avons commencé à travailler pour le notaire Pierre Desrosiers le jour même de notre arrivée au Canada, et que ce dernier nous verse un salaire mensuel de \$100.00 par mois chacun; moi comme secrétaire et mon épouse comme ménagère, et ceci en plus de la pension. Nous n'avons pas de contrat de signé avec lui mais nous serons payés à la fin de chaque mois. Nous toucherons notre premier salaire le 22 mai 1968."

Cette déclaration est partiellement incomplète pour constituer un fait à aucun moment contesté par Me Bélec ou Me Pharand lors de la procédure. Le jurat dit:

"déclaré devant moi à Hull, P.Q. ce 3<sup>e</sup> jour de mai, 1968, (signed) J.A.G. Dubé "Témoin - Fonctionnaire autorisé."

La loi sur la preuve au Canada C.S.R. 1952, c. 307 révisé, art. 37 dit entre autre:

"37. Tout juge, notaire public, juge de paix, magistrat de police ou magistrat stipendiaire, recorder, maire ou commissaire autorisé à recevoir les affidavits destinés à servir dans les cours provinciales ou fédérales, ou autre fonctionnaire autorisé par la loi à faire prêter serment en quelque matière que ce soit, peut recevoir la déclaration solennelle de quiconque la fait volontairement devant lui, selon la formule qui suit, pour attester soit l'exécution d'un écrit, Je, A.B., déclare solennellement que (exposer le fait ou les faits déclarés), et je fais cette déclaration solennelle conscienciseusement vraie et sachant qu'elle a la même force et le même effet que si elle était fait sous serment, aux termes de la Loi sur la preuve au Canada.

Déclaré devant moi

à ce jour 19 "

Article 10(4) de la Loi sur l'immigration dit:

"10(4) Chaque fonctionnaire à l'immigration est autorisé a faire prêter des serments et à recueillir des témoignages sous serment ou affirmation, dans toute affaire surgissant sous le régime de la présente loi." Il est évident, d'après la preuve apportée à l'enquête, que M. Dubé était un fonctionnaire à l'immigration. La forme de déclaration statutaire est en conformité avec l'article 32 de la Loi sur la preuve au Canada, hormis

M. Janvier was asked 3 questions relating to work in Canada before the Special Inquiry Officer produced the statutory declaration:

- at page 4: "Q. Quel était le but de votre voyage chez nous?
  - R. C'est de venir étudier; je devais étudier et travailler ici et rester avec ma femme."
- at page 9: "Q. Travaillez-vous depuis votre arrivée au Canada?
  - R. D'après moi, non.
  - Q. Voulez-vous reconsidérer votre réponse ou si vous maintenez que vous n'avez pas travaillé depuis que vous êtes au Canada?
  - R. D'après moi je n'ai pas essayé aucun travail ici au Canada."

M. Janvier then endeavoured to explain what he meant to say rather than what he apparently did say in paragraph 4 of the declaration, and the Special Inquiry Officer then read him section 50(f) of the Immigration Act. M. St-Louis then said at page 10 of the Minutes of Inquiry:

"Je n'ai aucune raison de douter que vous ayez travaillé depuis que vous êtes au Canada, j'ai même toutes les raisons de croire que vous avez effectivement travaillé."

All testimony on this point after this, including that of Me Desrosiers, was quite pointless, since the Special Inquiry Officer had made up his mind, and indeed his remarks to Me Desrosiers at the end of his testimony, above quoted, and his statement to M. Janvier at page 12: "C'est sur ce document (the declaration) que je me baserai pour rendre ma décision dans votre cas, car je ne peux pas accepter votre explication concernant le contenu de cette déclaration", indicate that he had taken his decision long before the inquiry was completed, thus reducing it to a farce.

Section 27(3) of the Immigration Act provides:

"The Special Inquiry Officer may at the hearing receive and base his decision upon evidence considered credible or trustworthy by him in the circumstances of each case."

Special Inquiry Officer St-Louis was entitled to "receive" and consider in reaching his decision, the statutory declaration of May 3, 1968 - it was undoubtedly "evidence" and probably primary evidence since M. Janvier was cross-examined thereon. But section 27(3) must be read in conjunction with section 11(3) of the Act, in particular paragraph (e) thereof:

le fait que M. Dubé a signé non seulement en tant que "fonctionnaire autorisé" mais aussi en tant que "témoin". Toutefois, il doit être soutenu que la déclaration statutaire est quant au fond en conformité avec l'article 37 de la Loi sur la preuve au Canada, et que le mot "témoin" n'est pas significatif et peut être ignoré puisque superflu. (Voir Phipson on Evidence 19th Ed., p. 622).

La Commission a fréquemment exprimé sa désapprobation au sujet de la trop grande importance donnée par l'enquêteur spécial aux déclarations statutaires; déclarations faites à l'enquête par le sujet de celle-ci sans les avantages de la présence d'un conseiller et sans que lui soit donné pendant l'enquête l'occasion d'expliquer, de développer, de renier la déclaration. Toutefois dans cette instance, l'enquêteur spécial, comme il avait le droit de le faire, a contre-interrogé M. Janvier sur sa déclaration (particulièrement à l'alinéa 4), et a aussi interrogé Me Desrosiers, le prétendu employeur. Il est évident que M. St-Louis n'a pas cru aux dénégations de M. Janvier relatives à l'alinéa 4 de la déclaration mentionnant l'acceptation d'un emploi au Canada, non plus aux explications de Me Desrosiers quant aux arrangements entre M. Janvier et lui-même.

L'examen de la preuve viva voce apportée à l'enquête sur M. Janvier, semblerait nier l'existence d'un contrat de travail autre qu'un contrat qui mentionnait entre autres conditions, l'autorisation des autorités de l'immigration. Pour qu'une personne ait "accepté un emploi" dans le sens du libellé du Règlement sur l'immigration il faut montrer l'existence d'un contrat de service, contrat verbal ou écrit, réel ou sous-entendu.

Par ailleurs, l'alinéa 4 de la Déclaration à l'enquête en lui-même prouve l'existence d'un contrat de service passé entre M. Janvier et Me Desrosiers; la mise à l'effet de ce contrat a été réelle pour l'enquête.

M. St-Louis a accepté les faits exprimés dans la déclaration et a rejeté la preuve viva voce qui contredisait ou expliquait les témoignages de la déclaration.

Lorsque la crédibilité est le seul point de litige, une Cour d'appel est extrêmement réticente à annuler la décision d'un tribunal inférieur. Mais, une étude du procès-verbal de l'enquête relative à M. Janvier montre clairement que la crédibilité ne peut être tenue pour le seul litige dans l'instance en appel.

L'enquêteur spécial avant d'introduire la déclaration statutaire a posé à M. Janvier trois questions relatives au travail au Canada:

à la page 4:

- "11(3) A Special Inquiry Officer has all the powers and authority of a commissioner appointed under Part 1 of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry,
  - (e) do all other things necessary to provide a full and proper inquiry."

M. St-Louis went through the motions of holding a full and proper inquiry - he listened to M. Janvier's testimony and to that of Me Desrosiers, but with a "closed mind". He did not in fact hold a full and proper inquiry.

Although the wording of section 11(3) is not mandatory ("may") the principle enunciated thereby is mandatory by virtue of section 2(e) of the Canadian Bill of Rights S.C. 1960, c. 44:

- "... no law in Canada shall be construed or applied so as to
  - (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

In Gooliah v Minister of Citizenship and Immigration (supra) the Manitoba Court of Appeal dismissed an appeal from a grant of certiorari quashing the deportation order on the grounds that the inquiry violated the rules of natural justice, and that it was marked by bias and prejudgment on the part of the Special Inquiry Officer. In the course of his judgment Freedman J.A. said (p.233)"... I feel bound to say that the Special Inquiry Officer apparently approached the matter with a mind made up." And at p. 234 "The performance of the Special Inquiry Officer on this matter was not that of one engaged in an objective search for truth. Rather it appeared to be an attempt to find justification or support for a point of view to which, in advance of the relevant testimony, he was already firmly committed. Such conduct falls below the standard to which a person engaged in a judicial or quasi-judicial task is expected to conform."

These words can be adopted as directly applying to the appeal of M. Janvier.

The Board finds therefore that M. St. Louis' conduct of the inquiry amounted to a denial of natural justice, and the appeal of M. Janvier must be allowed.

In the case of Mme Janvier, the evidence adduced at her inquiry does not support the conclusion reached that she had taken employment in Canada without the permission of an immigration officer.

- "Q. Quel était le but de votre voyage chez nous?
  - R. C'est de venir étudier; je devais étudier et travailler ici et rester avec ma femme."

# à la page 9:

- "Q. Travaillez-vous depuis votre arrivée au Canada?
- R. D'après moi, non.
- Q. Voulez-vous reconsidérer votre réponse ou si vous maintenez que vous n'avez pas travaillé depuis que vous êtes au Canada?
- R. D'après moi je n'ai pas essayé aucun travail ici au Canada."

M. Janvier a essayé d'expliquer ce qu'il a voulu dire plutôt que ce qu'il a apparemment dit à l'alinéa 4 de la déclaration et l'enquêteur spécial lui a ensuite lu l'article 50(f) de la Loi sur l'immigration. Ensuite M. St-Louis a dit à la page 10 du procèsverbal de l'enquête:

"Je n'ai aucune raison de douter que vous ayez travaillé depuis que vous êtes au Canada, j'ai même toutes les raisons de croire que vous ayez effectivement travaillé."

Après ceci, tout témoignage sur ce point y compris celui de Me Desrosiers est sans effet, puisque l'enquêteur spécial avait décidé des suites qu'il donnerait à l'enquête; en effet, ses remarques faites à la fin du témoignage de Me Desrosiers cité supra, et la page 12 de sa déclaration à M. Janvier: "C'est sur ce document (the declaration) que je me baserai pour rendre ma décision dans votre cas, car je ne peux pas accepter votre explication concernant le contenu de cette déclaration", montrent qu'il avait pris sa décision bien avant la fin de l'enquête, ainsi réduisant celle-ci à une farce.

Article 27(3) de la Loi sur l'immigration stipule:

"L'enquêteur spécial peut, à l'audition recevoir toute preuve qu'il estime croyable ou digne de foi, dans les circonstances particulières à chaque cas, et baser sa décision sur cette preuve."

L'enquêteur spécial avait le droit de "recevoir" et de considérer la déclaration statutaire du 3 mai 1968 pour établir sa décision - c'était indubitablement une "preuve" et probablement la meilleure preuve à produire puisque M. Janvier a été contre-interrogé sur celle-ci. Mais l'article 27(3) doit être lu à la lumière de l'article 11(3) de la Loi (en particulier de l'alinéa e):

Although she signed (as "1'épouse") the statutory declaration made by her husband on May 3, 1968, she was not a party thereto - she herself was not a declarant. It was not properly admitted and used at her inquiry. For a full discussion of the Board's powers to overrule the decision of a Special Inquiry Officer based on evidence admitted and used pursuant to section 27(3) of the Immigration Act, see Trefeissen v Minister Manpower and Immigration (I.A.B. unreported).

Throughout her inquiry, Mme Janvier denied having taken employment. At page 4 of the Minutes of her inquiry, questioned by the Special Inquiry Officer:

- "Q. Quel était le but de votre voyage au Canada?
  - R. De venir visiter le pays.
- Q. Qu'est-ce que vous avez fait depuis votre arrivée au Canada?
- R. J'ai fait ma lessive et celle de mon mari, nous préparons nos repas."

## And at page 6:

- 'O. Avez-vous travaillé dans votre pays?
- R. Non.
- Q. D'après le document que nous avons introduit tout à l'heure vous auriez travaillé au Canada à titre de ménagère. Aviez-vous au préalable obtenu la permission d'un fonctionnaire de notre Ministère?
- R. Non je suis venue ici comme visiteur. Je n'ai pas commencé à travailler, pas encore. Je fais des petites choses comme je ne peux pas rester inactive dans la maison et par reconnaissance aussi pour monsieur Desrosiers. Je lui fais des petites choses, par exemple, je fais sa lessive, des réparations de vêtements et je lui prépare le petit déjeuner le matin, seulement ça, je ne fais pas le dîner ou le souper. Pour nous autres, je fais notre lessive et nos repas. Monsieur Dubé nous avait tout expliqué ça mais je n'avais pas tout à fait compris ce qu'il disait alors c'est pour ça que j'ai signé bénévolement sans prendre attention à ce que je faisais. C'est tout.
- Q. Maintenant à part de faire une petite lessive pour monsieur Desrosiers et lui préparer son déjeuner est-ce que vous faites d'autres menus travaux de ménagère tels que épousse tage, etc.?

- "11(3) Un enquêteur spécial possède tous les pouvoirs et toute l'autorité d'un commissaire nommé en vertu de la Partie I de la Loi sur les enquêtes et, sans restreindre la généralité de ce qui précède, peut, aux fins d'une enquête,
  - e) accomplir toutes autres choses nécessaires pour une enquête complète et régulière."

M. St-Louis a suivi les différentes étapes d'une enquête complète et régulière - il a reçu le témoignage de M. Janvier et celui de Me Desrosiers, mais avec un "esprit obtus" (closed mind). En fait, il n'a pas tenu une enquête complète et régulière.

Bien que le libellé de l'article 11(3) ne soit pas impératif ("peut") le principe qui y est énoncé est impératif aux termes de l'article 2(e) de la Déclaration canadienne des droits S.C. 1960, c. 44:

- "... nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
  - (e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations."

Dans la cause Gooliah c. le Ministre de la citoyenneté et de l'immigration (supra) la Cour d'appel du Manitoba a rejeté un appel d'un octroi de certiorari annulant une ordonnance d'expulsion; car selon la Cour l'enquête a violé les règles de justice naturelle en ce que la partialité et les préjugés de l'enquêteur spécial ont marqué l'enquête. Au cours de son jugement Freedman J.A. a dit (p. 233) "... I feel bound to say that the Special Inquiry Officer apparently approached the matter with a mind made up." Et à la page 234 "The performance of the Special Inquiry Officer on this matter was not that of one engaged in an objective search for truth. Rather it appeared to be an attempt to find justification or support for a point of view to which, in advance of the relevant testimony, he was already firmly committed. Such conduct falls below the standard to which a person engaged in a judicial or quasi-judicial task is expected to conform."

On peut adopter ses mots comme s'appliquant directement à l'appel de M. Janvier.

La Commission déclare que la façon dont M. St-Louis a procédé à l'enquête a abouti sur une dénégation de justice naturelle, et en conséquence l'appel de M. Janvier est accueilli.

- R. Oui nous nous servons de la maison. Quand les choses sont sales nous les époussetons. Nous faisons un peu le balayage. C'est mon mari qui fait le balayage.
- Q. Votre mari nous a dit hier qu'il avait contracté des emprunts de Me Desrosiers couvrant les frais de voyage au Canada et également d'autres sommes qu'il lui a empruntées. Est-ce que vous personnellement êtes engagée à aider de rembourser ces sommes?
- R. Pas pour le moment mais lorsque nous commencerons à travailler ...
- Q. De quelle façon alors rembourserez-vous ce montant?
- R. Je vais rembourser ce montant par tranches, petites sommes.
- Q. Est-ce que vous et votre époux avez été invités par Me Desrosiers à venir au Canada pour travailler chez lui?
- R. Oui il nous avait invités à venir au Canada pour travailler au Canada lorsque nos papiers seront finis de régulariser et si nous avons vu aussi que nous pouvions rester ici aussi."

## At page 8:

- Q. Depuis que vous êtes au pays et que vous demeurez chez le notaire Desrosiers, est-ce que ce dernier vous a remis depuis le 22 avril 1968 des sommes d'argent?
- R. Oui depuis mon entrée ici le premier mois je lui ai demandé d'emprunter \$100.00 que je puisse régulariser mes affaires personnelles. Ensuite les autres mois, il y a un mois il m'a donné \$40.00 pour mes choses personnelles. En tout je crois que j'ai reçu de lui \$200.00 depuis mon entrée jusqu' à nos jours. Alors quand je commencerai à travailler je lui remettrai ça."

There is thus no proof of any contract of service, and paragraph 3(c) of the deportation order made against her is therefore contrary to the evidence and null and void.

For the reasons set out in Canelis v Minister of Manpower and Immigration, the other grounds of deportation, i.e. that she was not in possession of a visa as required by section 28(1) of the Immigration Regulations, Part I, nor did her passport contain a medical certificate as required by section 29(1), were prematurely invoked, and the appeal of Mme Janvier must be allowed.

Dated at Montréal, this 18th day of December, 1969. Concurred in by: Jean-Pierre Houle and Gérard Legaré.

For the appellant: Me Ronald Bélec and Me Michel Pharand; For the respondent: Me P. Bétournay and Me Jean-Paul Fortin.

Dans la cause de Mme Janvier, la preuve apportée à l'enquête ne confirme pas la conclusion, à savoir, qu'elle a occupé un emploi sans l'autorisation d'un fonctionnaire à l'immigration.

Bien qu'elle ait signé (comme "l'épouse" en français dans le texte) la déclaration statutaire produite par son mari le 3 mai 1968, elle n'était pas comprise dans celle-ci - elle n'était pas une déclarante. Ceci n'a pas été régulièrement admis ni utilisé à son enquête. Pour une argumentation complète sur les pouvoirs de la Commission de réviser la décision d'un enquêteur spécial - décision amenée par la preuve introduite et utilisée selon l'article 27(3) de la Loi sur l'immigration - voir la cause Trefeissen c. Ministre de la Main-d'oeuvre et de l'immigration (C.A.I. non rapporté).

Tout au long de son enquête, Mme Janvier a nié avoir occupé un emploi. A la page 4 du procès-verbal de l'enquête interrogée par l'enquêteur spécial, elle répond:

- ''Q. Quel était le but de votre voyage au Canada?
- R. De venir visiter le pays.
- Q. Qu'est-ce que vous avez fait depuis votre arrivée au Canada?
- R. J'ai fait ma lessive et celle de mon mari, nous préparons nos repas."

## et à la page 6:

- ''Q. Avez-vous travaillé dans votre pays?
  - R. Non.
- Q. D'après le document que nous avons introduit tout à l'heure vous auriez travaillé au Canada à titre de ménagère. Aviez-vous au préalable obtenu la permission d'un fonctionnaire de notre Ministère?
- R. Non je suis venue ici comme visiteur. Je n'ai pas commencé à travailler, pas encore. Je fais des petites choses comme je ne peux pas rester inactive dans la maison et par reconnaissance aussi pour monsieur Desrosiers. Je lui fais des petites choses, par exemple, je fais sa lessive, des réparations de vêtements et je lui prépare le petit déjeuner le matin, seulement ça, je ne fais pas le dîner ou le souper. Pour nous autres, je fais notre lessive et nos repas. Monsieur Dubé nous avait tout expliqué ça mais je n'avais pas tout à fait compris ce qu'il disait alors c'est pour ça que j'ai signé bénévolement sans prendre attention à ce que je faisais. C'est tout.

- Q. Maintenant à part de faire une petite lessive pour monsieur Desrosiers et lui préparer son déjeuner est-ce que vous faites d'autres menus travaux de ménagère tels que époussetage, etc?
- R. Oui nous nous servons de la maison. Quand les choses sont sales nous les époussetons. Nous faisons un peu de bala-yage.
- Q. Votre mari nous a dit hier qu'il avait contracté des emprunts de Me Desrosiers couvrant les frais de voyage au Canada et également d'autres sommes qu'il lui a empruntées. Est-ce que vous personnellement êtes engagée à aider de rembourser ces sommes?
- R. Pas pour le moment mais lorsque nous commencerons à travailler ...
- O. De quelle façon alors rembourserez-vous ce montant?
- R. Je vais rembourser ce montant par tranches, petites sommes.
- Q. Est-ce que vous et votre époux avez été invités par Me Desrosiers à venir au Canada pour travailler chez lui?
- R. Oui il nous avait invités à venir au Canada pour travailler au Canada lorsque nos papiers seront finis de régulariser et si nous avons vu aussi que nous pouvions rester ici aussi."

# à la page 8:

- Q. Depuis que vous êtes au pays et que vous demeurez chez le notaire Desrosiers, est-ce que ce dernier vous a remis depuis le 22 avril 1968 des sommes d'argent?
- R. Oui depuis mon entrée ici le premier mois je lui ai demandé d'emprunter \$100.00 que je puisse régulariser mes affaires personnelles. Ensuite les autres mois, il y a un mois il m'a donné \$40.00 pour mes choses personnelles. En tout je crois que j'ai reçu de lui \$200.00 depuis mon entrée jusqu'à nos jours. Alors quand je commencerai à travailler je lui remettrai ça."

Il n'y a ainsi aucune preuve de contrat de service; en conséquence, l'alinéa 3(c) de l'ordonnance d'expulsion rendue contre elle va à l'encontre du témoignage et est donc nul et non avenu.

Pour les raisons définies dans la cause Canelis c. le Ministre de la Main-d'oeuvre et de l'immigration, les autres motifs d'expulsion

(i.e. qu'elle n'était ni en possession d'un visa comme le prescrit l'article 28(1) du Règlement sur l'immigration, Partie I, ni d'un passeport contenant un certificat médical comme le prescrit l'article 29(1))ont été invoqués prématurément, et l'appel de Mme Janvier doit être accueilli.

Montréal le 18 décembre 1969.

Ont souscrit: Jean-Pierre Houle et Gérard Legaré.

Pour l'appelant: Mes Ronald Bélec et Michel Pharand;

Pour l'intimé: Mes P. Bétournay et Jean-Paul Fortin.

23

Soccora Rios VELA, and children,

appellants,

v .

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 27, 1969; File: 69-528.

Coram: A.B. Weselak, F. Glogowski, U. Benedetti.

Non-Immigrant - whether bona fide, in general - criteria to determine - Immigration  $\mathsf{Act}\colon \mathsf{5}(p)$  .

Held: Pursuant to the Raddenzatti case, the Board, upon a careful consideration of the Immigration Act and Regulations, is of the opinion that an applicant for entry into Canada is normally a bona fide non-immigrant if he

- (a) is a person who is a member of the classes designated in Section 7(1) and (2) of the Immigration Act;
- (b) is seeking to enter Canada for a legitimate and temporary purpose, and can establish this;
- (c) is truthful on examination;
- (d) is in apparent good health;
- (e) is of good character;
- (f) is not within the prohibited classes;
- (g) has sufficient assets (or satisfactory evidence of same) to maintain himself while in Canada as well as to effect his departure from Canada:
- (h) he has satisfactory proof of readmissibility to his country or to a third country;
- (i) has a valid passport (if applicable).

The judgment of the Board was delivered by:

#### A.B. Weselak:

This is an appeal from a Deportation Order dated March 21, 1969, made by Special Inquiry Officer Russell Berg at Montreal International Airport, Dorval, Quebec, in respect of the appellant, Socorra Rios VELA, in the following terms:

- "1) you are not a Canadian citizen;
- you are not a person having acquired Canadian domicile; and that
- 3) you are a member of the prohibited class described in paragraph (p) of Section 5 of the Immigration Act, in that my opinion, you are not a bona-fide non-immigrant.

28. Socorra Rios VELA et enfants,

appelants,

v .

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 27 novembre 1969; Dossier: 69-528.

Coram: A.B. Weselak, F. Glogowski, U. Benedetti.

Non-immigrant - en général, s'il est ou non de bonne foi - critère pour déterminer - Loi sur l'immigration: 5(p)

Arrêt: Après un examen minutieux de la Loi sur l'immigration et du Règlement et en conformité avec la cause Raddenzatti la Commission estime qu'une personne demandant le droit d'entrée au Canada est normalement un non-immigrant de bonne foi si:

- (a) C'est une personne qui est membre de n'importe laquelle des classes désignées à l'article 7, paragraphes 1 et 2 de la Loi sur l'immigration;
- (b) Il cherche à entrer au Canada dans un but légitime et temporaire, et s'il est capable de montrer ceci;
- (c) Il dit la vérité lors de son examen;
- (d) Il est apparamment en bonne santé;
- (e) Il a une bonne réputation;
- (f) Il n'est pas membre d'une des catégories interdites;
- (g) Il a les moyens suffisants (ou une preuve satisfaisante de ceux-ci) tant pour subvenir à ses besoins par lui-même au Canada que pour quitter le Canada;
- (h) Il a une preuve satisfaisante de sa réadmissibilité dans son pays ou dans un troisième pays;
- (i) Il a un passeport valide (s'il y a lieu).

Le jugement de la Commission fut rendu par:

#### A.B. Weselak:

Appel d'une ordonnance d'expulsion rendue à l'aéroport international de Montréal à Dorval au Québec par l'enquêteur spécial Russell Berg contre l'appelant Socorra Rios VELA. L'ordonnance dit:

- "1) you are not a Canadian citizen;
- you are not a person having acquired Canadian domicile; and that
- 3) you are a member of the prohibited class described in paragraph (p) of Section 5 of the Immigration Act, in that my opinion, you are not a bona-fide non-immigrant.

This decision includes also your two children, Carlos Martinez Vela and Oscar Luis Martinez Vela."

The appellants were not present at the hearing of the appeal nor were they represented by counsel. The respondent was represented by Mr. W. Bernhardt. Written submissions were received by the Board from appellants' counsel.

The appellants aged twenty-seven and two children aged six and and eight years are citizens of Peru and entered Canada on the 19th March 1969 seeking admission as visitors for three months. They were in possession of valid Peruvian passport, \$220.00 and return transportation. The appellant wished to marry a United States citizen and had applied for a resident visa from the United States Embassy in Peru, but such visa had been refused. She was then told by a travel agent and her fiancé that if she came to Canada on a visit for three months, that they could marry in Canada, and then obtain entry to the United States of America.

Upon examination at the Airport in Montreal, the Immigration officer formed the opinion that she was not a bona fide non-immigrant and cited in his Section 23 report as the reasons for his findings

- (i) She has insufficient funds to maintain herself and children during the requested stay in Canada for a duration of three months.
- (ii) She has no friends or relatives in Canada who could be called upon for assistance.

In the appeal of Jean-Claude Raddenzati (68-5299) the Board upon a careful consideration of the Immigration Act and Regulations thereunder was of the opinion that an applicant for entry into Canada was normally a bona fide non-immigrant if:

- (a) He is a person who is a member of any of the classes designated in Section 7, subsections 1 and 2 of the Immigration Act.
- (b) He is seeking to enter Canada for a legitimate and temporary purpose; and is able to establish this.
- (c) He is truthful on examination (vide Section 20(2)).
- (d) He is in apparent good health.
- (e) He is of good character.
- (f) He is not within the prohibited classes.
- (g) He has sufficient assets (or satisfactory evidence of same) to maintain himself while in Canada as well as to effect his departure from Canada.
- (h) He has satisfactory proof of re-admissibility to his country or to a third country.
- (i) Has a valid passport (if applicable).

This decision includes also your two children, Carlos Martinez Vela and Oscar Luis Martinez Vela."

Les appelants n'étaient pas présents à l'audition de l'appel mais étaient représentés par un conseiller. M.W. Bernhardt occupait pour l'intimé. Des plaidoiries écrites du conseiller des appelants ont été reçues par la Commission.

Les appelants, le mère âgée de vingt-sept ans et deux enfants âgés de six et huit ans sont des citoyens du Pérou; ils sont entrés au Canada le 19 mars 1969 cherchant à être admis en tant que visiteurs pour une période de trois mois. Ils étaient en possession d'un passeport péruvien valide, de \$220.00 et de leur billet de retour. Désirant se marier avec un citoyen des États-Unis, l'appelante a demandé un visa de résidence à l'ambassade des États-Unis au Pérou, qui le lui a refusé. Par la suite, un agent de voyage ainsi que son fiancé lui ont dit que si elle allait au Canada en tant que visiteur pour, trois mois, elle pourrait s'y marier et enfin obtenir l'admission aux États-Unis.

D'après l'examen subi par l'appelante à l'aéroport de Montréal, le fonctionnaire à l'immigration a estimé qu'elle n'était pas un non-immigrant authentique et dans son rapport prévu à l'article 23 il a donné les raisons à l'appui de sa conclusion:

- (i) Pour une période de trois mois au Canada (durée du séjour demandé) elle n'a pas les fonds nécessaires pour subvenir à ses besoins et à ceux de ses enfants.
- (ii) Elle n'a pas d'amis ou de parents au Canada qui pourraient l'assister.

Dans l'appel de Jean-Claude Raddenzati (68-5299) après un examen minutieux de la Loi sur l'immigration et de son Règlement la Commission a estimé qu'une personne qui demande le droit d'entrée au Canada, était normalement un non-immigrant de bonne foi si:

- (a) C'est une personne qui est membre de n'importe laquelle des classes désignées à l'article 7, paragraphes 1 et 2 de la Loi sur l'immigration;
- (b) Il cherche à entrer au Canada dans un but légitime et temporaire, et s'il est capable de montrer ceci;
- (c) Il dit la vérité lors de son examen;
- (d) Il est apparamment en bonne santé;
- (e) Il a une bonne réputation;
- (f) Il n'est pas membre d'une des catégories interdites;
- (g) Il a les moyens suffisants (ou une preuve satisfaisante de ceux-ci) tant pour subvenir à ses besoins par luimême au Canada que pour quitter le Canada;
- (h) Il a une preuve satisfaisante de sa réadmissibilité dans son pays ou dans un troisième pays;
- (i) Il a un passeport valide (s'il y a lieu).

The evidence at the Inquiry does not disclose any reason why the appellant fails to qualify under any of these criteria supra. The Section 23 report however does question whether she qualifies for entry under (g).

The appellants were in possession of return transportation. Evidence received at the Inquiry relating to their ability to maintain themselves in Canada was as follows:

At page 7 of the Minutes of Inquiry

- "Q. Upon arrival in Canada, how much money did you have in your possession?
- A. \$220.00
- Q. Do you have other funds available?
- A. Yes, in New Jersey.

BY COUNSEL (to special inquiry officer)

 ${\rm Mrs.}$  Silverman, a friend in New Jersey, can supply her with funds, and myself."

and at pages 9 and 10 of the said Minutes

- "Q. Is it your intention to marry Miss Vela if possible?
- A. Yes, it certainly is.
- Q. What guarantees can you offer, Mr. Whitworth, regarding her requested period of stay in Canada. That is guarantees financially or otherwise?
- A. I will take care of their needs as far as room and board is concerned for the length of their stay in Canada. If necessary I can provide \$60.00 a week.
- O. Would you give me the name and address of your employer?
- A. Brennan's Dairy, 47 Division Ave., Sommet, New Jersey.
- Q. How long have you been employed with this company?
- A. 6 years approximately.
- Q. Your approximate salary is how much per month?
- A. \$600.00.
- Q. Is anyone financially dependent on you for support?
- A. No.
- Q. How much money do you have with you at the present time?
- A. \$160.00 U.S. funds."

This evidence was not questioned or contradicted at the Inquiry and in the opinion of the Board should have been accepted by the Special

La preuve à l'enquête ne révèle aucune des raisons démontrant pourquoi l'appelante n'a pu satisfaire aux exigences des critères supra. Toutefois, le rapport prévu par l'article 23 conteste la compétence de l'appelante pour ce qui regarde son entrée selon (g).

Les appelants étaient en possession d'un billet de retour. Quant à leur capacité de subvenir à leurs besoins par eux-mêmes la preuve reçue à l'enquête dit:

A la page 7 du procès-verbal de l'enquête:

- "Q. Upon arrival in Canada, how much money did you have in your possession?
- A. \$220.00.
- Q. Do you have other funds available?
- A. Yes, in New Jersey.

BY COUNSEL (to special inquiry officer)

Mrs. Silverman, a friend in New Jersey, can supply her with funds, and myself."

et aux pages 9 et 10 du dit procès-verbal:

- "Q. Is it your intention to marry Miss Vela if possible?
- A. Yes, it certainly is.
- Q. What guarantees can you offer, Mr. Whitworth, regarding her requested period of stay in Canada. That is guarantees financially or otherwise?
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- A. No.
- Q. How much money do you have with you at the present time?
- A. \$160.00 U.S. funds."

Inquiry Officer. If this evidence had been accepted by the Special Inquiry Officer it would have been apparent that the appellants had access to sufficient funds to maintain themselves during their stay in Canada for the requested period of time. The mere fact that such funds were in the United States of America and not in Canada should not be sufficient reason to disqualify the appellants considering the proximity of the United States of America and the facility of communication and transmission of funds.

The mother married her United States resident fiancé on the 7th of April 1969 and the appellants were accepted as United States residents and issued Alien Registration Cards on September 23, 1969.

The Board finds that at the Inquiry the appellants were improperly found to be persons prohibited entry under Section 5(p) of the Immigration Act.

The appeal is therefore allowed.

Dated at Ottawa, this 19th day of December 1969.

Concurred in by: F. Glogowski and U. Benedetti.

For the appellants: Lester T. Whitworth, Esq.;

For the respondent: W. Bernhardt, Esq.

Cette preuve n'a été ni contestée, ni contredite lors de l'enquête et la Commission estime qu'elle aurait dû être acceptée par l'enquêteur spécial. Si la preuve avait été acceptée par l'enquêteur spécial il aurait manifeste que les appelants pouvaient disposer des fonds nécessaires pour subvenir par eux-mêmes à leurs besoins durant leur séjour au Canada pour la période de temps demandée. Le simple fait que les fonds étaient aux États-Unis d'Amérique et non au Canada, ne devrait pas constituer une raison suffisante pour , frapper d'incapacité les appelants considérant la proximité des États-Unis d'Amérique, la rapidité dans les communications et la facilité pour les transferts de fonds.

La mère s'est mariée avec son fiancé, résident des États-Unis, et les appelants ont été acceptés aux États-Unis en tant que résidents et ont reçu une carte d'étrangers (Alien Registration Cards) le 23 septembre 1969.

La Commission déclare que l'enquêteur a conclu d'une façon irrégulière que les appelants appartenaient à la catégorie de personne à laquelle est interdite l'entrée selon l'article 5(p) et de la Loi sur l'immigration.

En conséquence, l'appel est accueilli.

Ottawa le 19 décembre 1969.

Ont souscrit: F. Glogowski et U. Benedetti.

Pour les appelants: M. Lester T. Whitworth;

Pour l'intimé: M. W. Bernhardt.

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